SUBJECT INDEX.

PAGE

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 4

Statement of the case 5

Evidence dealing with the issues of membership in and affiliation with the Communist Party 6

(a) The pre-affidavit period: April, 1946, to August, 1949 6

(b) The post affidavit period 11

Denial of access to informer reports to F.B.I. made by the witnesses Matusow and Ford contemporaneously with the events and transactions covered in their testimony 14

Instructions 16

1. Membership 16
2. Affiliation 16
3. Findings jury was to make 17
4. Credibility of informers 17

Proceedings on the motion for new trial 17

The evidence on the motion for new trial 18

Denial of access to F.B.I. reports by Matusow at the hearing on the motion for new trial 21

Summary of argument 22

Argument 25

Point One. The court below erred in affirming the ruling of the trial court, which denied petitioner's request for an order requiring the government to product the F.B.I. reports to the court for its determination as to relevance and making available to petitioner such reports as were relevant 25

PAGE

(a) Petitioner's request, at the trial, with reference to Matusow's reports to the F.B.I. which he was employed to make and did make contemporaneously with the transactions covered in his direct testimony..... 25

(b) Petitioner's request, at the hearing on the motion for new trial, with reference to the same reports..... 33

(c) Petitioner's request, at the hearing, for the record of Matusow's interview with the F.B.I. agent at Santa Fe 39

(d) Petitioner's request, at the trial, with reference to Ford's reports to the F.B.I., which he was employed to make, and did make, contemporaneously with the transactions covered in his direct testimony..... 42

Point Two. The court below erred in approving the District Court's charge to the jury as well as its refusals to charge on the issue of membership..... 44

(a) The charge was an abdication by the trial court of its responsibility to guide the jury by appropriate legal criteria 44

(b) The charge permitted the jury t nd membership solely on the basis of the pre-affidavit evidence and was therefore in conflict with this court's construction of the statute in American Communications Assn. v. Douds, 339 U. S. 382, 413-414. It violated the presumption of innocence and permitted drawing from innocent prior membership an arbitrary inference of continued membership having criminal consequences..... 55

(c) The statute as applied in the instruction on membership was rendered so vague, indefinite and uncertain as to afford no ascertainable standard of guilt, and to embrace speech and association protected by the First Amendment 60

(d) The instruction was vague and misleading in connection with the requirement that the jury determine and confine its judgment to, the accused's meaning of the critical word member 65

PAGE

Point Three. The court below erred in approving the rulings of the trial court concerning instructions on the issue of affiliation 69

(a) The trial court gave the jury no legal guide on the issue of affiliation 69

(b) To the extent that the charge contained any criteria of affiliation, they were in conflict with those defined by this court in Bridges v. Wixon, 326 U. S. 135 71

(c) The instruction permitted the jury to find affiliation solely on the basis of the pre-affidavit evidence and was therefore in conflict with this court's construction of the statute in the Douds case, 339 U. S. 382, 413-414 75

(d) The instruction failed to require the jury to determine and limit its finding to petitioner's meaning of the critical word affiliate 76

Point Four. The court below erred in affirming the refusal of the trial court to instruct the jury, as requested, to approach the testimony of the paid F.B.I. informants herein with caution and to weigh it with great care 77

Conclusion 88

Appendices:

I. Comparison of Matusow testimony at the trial of Jencks and in his recantation thereof ..... App. p. 1

II. Summary of evidence adduced at hearing on motion for new trial, arranged in chronological order ..... App. p. 17

III. Opinion of Judge Bazelon in Gold v. United States (C. A., D. C.), No. 12352, opinion filed April 19, 1956 ..... App. p. 39

TABLE OF AUTHORITIES CITED

Cases	Page
American Communications Assn. v. Douds, 339 U. S. 382	3, 23, 27, 42, 45, 55, 63, 64, 65, 73, 74, 78, 79
Andres v. United States, 333 U. S. 740	53
Arnold v. United States, 94 F. 2d 499	83
Beaty v. United States, 203 F. 2d 652	34
Bihn v. United States, 328 U. S. 633	54
Bird v. United States, 180 U. S. 356	52
Bollenbach v. United States, 326 U. S. 607	52, 54, 70
Bowman Dairy Co. v. United States, 341 U. S. 214	29
Bridges v. United States, 199 F. 2d 811	49, 51
Bridges v. Wixon, 326 U. S. 135	3, 24, 64, 74, 75, 76
Bruno v. United States, 308 U. S. 287	52
Chapman v. American Legion, 244 Ala. 553, 14 So. 2d 225	45
Cleveland C. C. & St. L. R. Co. v. Starks, 58 Ind. 341, 106 N. E. 646	58
Colyer v. Skeffington, 265 Fed. 17	79
Communist Party v. Subversive Activities Control Board, 351 U. S. 115	31, 35, 84, 87
Connolly v. General Constr. Co., 269 U. S. 385	60
Cratty v. United States, 163 F. 2d 844	82
DeJonge v. Oregon, 299 U. S. 353	63
Di Carlo v. United States, 6 F. 2d 364	34
District of Columbia v. Clawans, 300 U. S. 617	82
Ellicott v. Pearl, 35 U. S. (10 Pet.) 412	34
Fisher v. United States, 231 F. 2d 99	27, 28, 30, 32, 44, 61, 66, 72, 82
Fiswick v. United States, 329 U. S. 211	78
Fletcher v. United States, 158 F. 2d 321	82
Fotie v. United States, 137 F. 2d 831	66
Freed v. United States, 266 Fed. 1014	82

PAGE

Gelbin v. N. Y., N. H. & H. R.R. Co., 62 F. 2d 500 34
Gold v. United States, No. 12352 66
Goldman v. United States, 316 U. S. 129, 226 F. 2d 552, n. 19 .. 29
Gordon v. United States, 178 F. 2d 896 ..... 35, 41
Gordon v. United States, 344 U. S. 414 ..... 22, 26, 29, 31, 35
Hague v. C.I.O., 307 U. S. 496 63
Haywood v. United States, 268 Fed. 795 58
Herndon v. Lowry, 301 U. S. 242 ..... 53, 60, 75
Herron v. Southern Pacific Co., 283 U. S. 91 53
Hilliard v. United States, 24 F. 2d 99 66
Hostetter Co. v. Bower, 74 Fed. 235 82
Hupman v. United States, 219 F. 2d 243 56
Inland Steel Co. v. National Labor Relations Board, 170 F. 2d 247 74
Interstate Circuit v. United States, 306 U. S. 208 36
Johns v. United States, 227 F. 2d 374 82
Kammann v. United States, 259 Fed. 192 58
Kotteakos v. United States, 328 U. S. 750 ..... 54, 87
Kubilius v. Hawes, 322 Mass. 638, 79 N. E. 2d 5 45
Lanzetta v. New Jersey, 306 U. S. 451 46
Larrison v. United States, 24 F. 2d 82 35
Lett v. United States, 15 F. 2d 686 82
Luse v. United States, 49 F. 2d 241 66
M. Kraus and Bros. v. United States, 327 U. S. 614 54
Maggio v. Zeitz, 333 U. S. 56 57
Martin v. United States, 17 F. 2d 973 35
McNabb v. United States, 318 U. S. 332 ..... 84, 86, 87
Mooney v. Holohan, 294 U. S. 103 40
Morrison v. California, 291 U. S. 82 59
Musser v. Utah, 333 U. S. 95 53
Nudd v. Burrows, 91 U. S. 426 52

PAGE

People v. Davis, 52 Mich. 569, 18 N. W. 362 30
Quercia v. United States, 289 U. S. 466 53
Schneiderman v. United States, 320 U. S. 118 76
Screws v. United States, 325 U. S. 91 54
Seymour v. United States, 77 F. 2d 577 66
Shelton v. United States, 205 F. 2d 806 41
Smith v. Kern County Medical Assn., 19 Cal. 2d 263, 120 P. 2d 874 45
Sparf v. United States, 156 U. S. 51 ..... 53, 54
Stromberg v. California, 283 U. S. 359 ..... 63, 75
Terminiello v. Chicago, 337 U. S. 1 ..... 54, 63
Thomas v. Collins, 323 U. S. 516 63
Thornhill v. Alabama, 310 U. S. 88 75
Tot v. United States, 319 U. S. 463 ..... 59, 60
Traders Mutual Life Ins. Co. v. Humphrey, 109 Ill. App. 246 45
United Brotherhood of Carpenters v. United States, 330 U. S. 395 ..... 54, 56
United States v. Andolschek, 142 F. 2d 503 ..... 27, 30
United States v. Beekman, 155 F. 2d 580 ..... 27, 30
United States v. Cardiff, 344 U. S. 174 54
United States v. C.I.O., 335 U. S. 106 63
United States v. Cohen, 145 F. 2d 82 ..... 27, 28
United States v. Cohen Grocery Co., 255 U. S. 81 60
United States v. Coplon, 185 F. 2d 629 30
United States v. Dennis, 183 F. 2d 201; aff'd, 341 U. S. 494 57
United States v. Flynn, 130 Fed. Supp. 412 ..... 18, 20, 36, 84
United States v. Flynn, et al., 216 F. 2d 354; cert. den., 348 U. S. 909 ..... 14, 18, 36
United States v. Holton, 222 F. 2d 840 49
United States v. Johnson, 327 U. S. 106 35
United States v. Krulewitch, 145 F. 2d 76 ..... 27, 28, 30

PAGE

United States v. Mesarosh, 116 Fed. Supp. 345 30
United States v. Reimer, 79 F. 2d 315 44
United States v. Remington, 191 F. 2d 246; cert. den., 343 U. S. 907 66
United States v. Ross, 92 U. S. 281 81
United States v. Schneiderman, 106 Fed. Supp. 731 ..... 28, 30
Weiler v. United States, 323 U. S. 606 54
White v. Ragen, 324 U. S. 760 40
Wieman v. Updegraf, 344 U. S. 183 ..... 63, 64, 76
Winters v. New York, 333 U. S. 507 ..... 63, 75
Wolf v. United States, 259 Fed. 388 58

MISCELLANEOUS

Chafee, The Blessings of Liberty (1956), pp. 95-97 ..... 79, 80
Chafee, The Blessings of Liberty (1956), p. 243 46
Chafee (1941), Free Speech in the United States, pp. 215-218, 277-280, 489-490 ..... 79, 86
100 Congressional Record, p. 14849 47
100 Congressional Record, pp. 14849, 15237 47
100 Congressional Record, p. 15112 47
1 Commons (1918), History of Labor in the United States, p. 403 79
2 Commons (1918), History of Labor in the United States, pp. 195-197, 337, 339, 415-416 79
2 Constitutional History of England (1880), pp. 275-276 ..... 79, 86
Ecclesiasticus XXI, p. 31 86
Guide to Subversive Organizations and Publications (1951), p. 5 47
Hand, L. (1953), The Spirit of Liberty, p. 284 85
Hearings, Feb. 22, 1955, 84th Cong., 1st Sess. 18
1 Lea (1922), A History of the Inquisition of the Middle Ages, pp. 371, 387 86
3 Lea (1922), A History of the Inquisition of the Middle Ages, p. 191 86

PAGE

Miller (1951), Crisis in Freedom, p. 53 86
New York Times (July 8, 1954), Editorial 85
New York Times (Feb. 1, 1955), Anti-Red Witness Confesses He Lied 84
New York Times (Feb. 5, 1955), Editorial 84
New York Times (Feb. 16, 1955), Matusow Admits Faking Blacklist 84
New York Times (Feb. 17, 1955), Motusow Heard on Oxnam Views 84
New York Times (Feb. 18, 1955), Matusow Study Widened by U. S. 84
New York Times (Mar. 3, 1955), Matusow Admits Lies Against 244 84
New York Times (Aug. 12, 1956) 85
Senate Resolution No. 58 (1955), 84th Cong., 1st Sess. 84
23 University of Chicago Law Review, pp. 173, 182, n. 28 47
41 Virginia Law Review (1955), Jefferson and the Bill of Rights, pp. 709, 721 83
Webster's International Dictionary (2d Ed.) 71, 77
2 Wharton, Criminal Evidence (11th Ed.), Sec. 922, p. 1604 .. 78
2 Wharton's Criminal Law (12th Ed.), pp. 1782, 1786 67
3 Wigmore, Evidence (3d Ed.), Sec. 738, p. 76 27
3 Wigmore, Evidence (3d Ed.), Sec. 1042, p. 733 ..... 27, 32
4 Wigmore, Evidence (3d Ed.), Sec. 1056, p. 17 ..... 31, 81
4 Wigmore, Evidence (3d Ed.), Sec. 1128, pp. 203-207 34
4 Wigmore, Evidence (3d Ed.), Sec. 1129, pp. 203-207 34
7 Wigmore, Evidence (3d Ed.), Sec. 2094, pp. 466-477 31
64 Yale Law Journal, pp. 712, 750 47
60 Yale Law Journal (1951), Donnelly, R. C., Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, pp. 1091, 1121, 1122, 1126 ..... 79, 82, 83

RULES

PAGE

Federal Rules of Criminal Procedure, Rule 33 17

STATUTES

Communist Control Act of 1954 (Act of Aug. 24, 1954), Chap. 886 47

68 Statutes at Large p. 775 47

United States Code, Title 18, Sec. 1001 ..... 4, 5, 56, 60, 65, 66

United States Code, Title 18, Sec. 1621 65

United States Code, Title 28, Sec. 1254(1) 1

United States Code Annotated, Title 29, Sec. 159(h) 4, 5, 6, 16, 60

United States Code Annotated, Title 50, Sec. 841 47

United States Code Annotated, Title 50, Sec. 844 47

United States Constitution, Art. I, Sec. 9, Clause 3 5

United States Constitution, First Amendment 5, 71, 75

United States Constitution, Fifth Amendment 5, 71

United States Constitution, Sixth Amendment 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 23

CLINTON E. JENCKS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals affirming the judgment of conviction of the District Court is reported at 226 F. 2d 540. The opinion of the Court of Appeals affirming the order of the District Court denying petitioner's motion for new trial upon the ground of newly discovered evidence is reported at 226 F. 2d 553.

Jurisdiction.

The judgments of the Court of Appeals were entered October 26, 1955. Timely petitions for rehearing were denied on December 1, 1955. [R. 522, H. 847.][1] Petition for certiorari was filed December 28, 1955, and granted March 5, 1956. 350 U. S. 980.

The jurisdiction of this Court is invoked under 28 U. S. C., section 1254(1).

---

[1]The trial record will be referred to as "R. ____". The record on the hearing of the motion for new trial as "H. ____". They are separately printed and paginated.

Questions Presented.

1. Whether on the cross-examination of a key government witness, who had been employed by the F.B.I. as an informer, the trial court on application should require the Government to produce to it the witness' contemporaneous reports to the F.B.I. concerning the transactions covered in his direct testimony and make available to the accused so much of those reports as are relevant for impeachment of the witness.

2. Whether, when a witness described as above fully recants his trial testimony and testifies in support of a motion for new trial and his recantation is attacked on cross-examination as a recent fabrication corruptly induced, the trial court should on application require the Government to produce to it the same reports and make available to the accused so much of those reports as are relevant to the truth of the recantation and the rehabilitation of the witness.

3. Whether under the circumstances described in question two the trial court should on application require the Government to produce to it a statement dictated by the witness to an F.B.I. agent before the trial to the effect that he did not believe his grand jury testimony herein to be honest and make available to the defendant so much of that statement as is relevant to the rehabilitation of the witness.

4. Whether the trial court's instruction on the issue of membership,

(a) failed to provide the jury with any legal yardstick against which to appraise the evidence, thus denying petitioner due process of law, invading the legislative power of the Congress and depriving petitioner of a jury trial;

(b) permitted the jury to make a finding of membership in the Communist Party as of April 28, 1950, solely upon evidence of membership long in advance of that date, contrary to the decision of this Court in *American Communications Assn. v. Douds*, 339 U. S. 382, and failed to advise the jury of limitations upon criminal liability under the statue involved;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt and abridged First Amendment liberties.

5. Whether the trial court's instructions on the issue of affiliation,

(a) defined affiliation in a manner contrary to that decided by this Court in *Bridges v. Wixon*, 326 U. S. 135;

(b) provided the jury with a wholly confusing and misleading charge and failed to furnish it a useable legal yardstick thus denying petitioner due process of law, invading the legislative power of the Congress and depriving petitioner of a jury trial;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt and abridged First Amendment liberties.

6. Whether the trial court at the request of the accused should instruct the jury that the testimony of witnesses who had been employed by the F.B.I. as informers posing as members of the Communist Party, and in that capacity had participated in the transactions with the accused covered in their testimony, should be approached with caution and weighed with great care.

Statutes Involved.

1. 29 U. S. C. A., section 159(h):

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section; and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits." July 5, 1935, c. 372, §9, 49 Stat. 453; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 143; Oct. 22, 1951, c. 534, §1(c. d), 65 Stat. 601.

2. 18 U. S. C., section 1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 749.

The pertinent provisions of the Constitution involved are:

1. *The First Amendment:*

"Congress shall make no law . . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

2. *The Fifth Amendment:*

"No person shall . . . . be deprived of life, liberty, or property, without due process of law . . ."

3. *The Sixth Amendment:*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . . to have compulsory process for obtaining witnesses in his favor . . ."

4. *Article I, Section 9, Clause 3:*

"No Bill of Attainder or *ex post facto* Law shall be passed."

Statement of the Case.

Petitioner was charged and found guilty in two counts of filing with the National Labor Relations Board a false affidavit of non-Communist union officer contrary to 18 U. S. C., section 1001, and 29 U. S. C.A., section 159(h). He was sentenced to a term of five years' imprisonment on each count, the sentences to run concurrently.

The indictment [R. 1] was filed April 20, 1953. It alleged that on April 28, 1950, the defendant made and filed the affidavit and that he knew it contained a false denial of membership in the Communist Part (count one) and a false denial of affiliation with that Party (count two). The affidavit [G-1, R. 383] was purportedly exe-

cuted and filed in connection with an effort by Local 890, International Union of Mine, Mill & Smelter Workers[2] to comply with the requirements of 29 U. S. C. A., section 159(h). All issues concerning the making and filing of the affidavit have been determined adversely to petitioner by the jury's verdict.

Evidence Dealing With the Issues of Membership in and Affiliation With the Communist Party.

(a) The Pre-Affidavit Period: April, 1946, to August, 1949.

CURRIE: Testified to a "closed Communist Party meeting" of veterans at the home of Arthur Barry, Chairman of the Communist Party of Colorado, in April, 1946. This meeting occurred four years before the affidavit. All persons present were "known" to the witness to be members of the Communist Party. Barry gave a "report" urging veterans to join veterans organizations "in order to further the aims of the Communist Party." Jencks said there were too many Communist Party members in American Veterans Committee and they should "spread themselves into other veterans organizations." He said that veterans faced problems all over the country which could be met only by the activity of Communist Party members in raising them before the membership of veterans organizations. [R. 86-89.]

FORD: Testified to five Communist Party meetings as follows:

(a) *Albuquerque*, August, 1948—one year and nine months before the affidavit. Held at home of Joseph DeSanti, chairman of Albuquerque City Branch of the Communist Party, as part of the 1948 election campaign

---

[2]The Internatoinal Union is herein called Mine-Mill.

of the Progressive Party. All persons present were "known" as members of Communist Party. Jencks told of his plans to further his candidacy for Congress, saying he would do all in his power to further the cause of the Progressive Party and would concentrate on getting out the vote. [R. 100-101.]

(b) *Santa Fe,* February, 1949—one year and two months before the affidavit. Called and presided over by DeSanti. He said there was to be a meeting of a Mexican-American Association and he wanted delegates chosen for it. All those chosen, including Jencks, were "known" to the witness as Communist Party members. [R. 101-102.]

(c) *Hot Springs,* April, 1949—one year before the affidavit. The witness said Jencks was then in charge of the southern area of New Mexico for the Communist Party. This meeting was called by DeSanti to complete the organization of the Communist Party in New Mexico. Jencks was given responsibility for labor, while others were asked to carry out the Party's interest in such fields as civil rights, Progressive Party, Mexican-American work. Jencks said he would do all in his power to support the organization, would concentrate on recruiting workers and would get greater financial support for the Party. He was made a member of its State Board. [R. 104-107.]

(d) *Albuquerque,* May, 1949—eleven months before the affidavit. Jencks reported on his labor work, saying that he was recruiting among labor and avoiding an earlier mistake by concentrating on quality of members, that he was going to see that members were indoctrinated in Marxism-Leninism, that the union newspaper would be open to support the Communist Party on issues concerning it, and that he would share his responsibilities with Arthur Flores. [R. 108-109.]

(e) *Santa Fe,* July or August, 1949—eight or nine months before the affidavit. Called by DeSanti in preparation for a meeting of the Mexican-American Association at Albuquerque. DeSanti said that the Communist Party leaders should do all in their power to support that meeting and cautioned them to "take the background and not be too conspicuous." [R. 109-110.] All persons present were "known" to the witness as members of the Communist Party. [R. 113.]

In addition Ford testified that he and Jencks attended the meeting of the Mexican-American Association just referred to. Jencks' wife spoke there in opposition to a proposed resolution that would have required the organization to disavow Communist support, saying that the resolution would deter the organization from its main purpose of fighting discrimination against Mexican-Americans in the Southwest. [R. 113.]

Finally the witness said that he was one of the security officers for the Communist Party in New Mexico during 1949. As such he dealt with defections and discipline of Party members. In that time no disciplinary action was taken against Jencks in the latter's presence. [R. 115, 119.] During the period "starting in 1949 and up to September in 1950" Jencks was not "replaced in his position on the State Board." [R. 133.]

BROOKS: Conversation on Brooks' front porch in Hanover, New Mexico, in May, 1947—nearly three years before the affidavit. Jencks said he couldn't think of anything more admirable in a child than loyalty to his mother. Someone else said he disagreed, contending that a child should be taught to respect the laws of his country and his creator equally as much. Jencks dismissed this as "foolishness," and Brooks commented that Jencks' re-

marks sounded like "Communist beliefs." Jencks retorted that "he was a Communist and proud of it." [R. 200-201.]

KNOTT: Meeting at Bayard, New Mexico, "in the latter part of 1946"—nearly three and one-half years before the affidavit.

Knott is a former member of the Communist Party and one-time representative of Mine-Mill. He traveled to Bayard and met with an officer of Mine-Mill, the Communist Party organizer for Arizona and Southern New Mexico, and Jencks. At that time Jencks had just been assigned to the area as a representative of Mine-Mill. There was discussed the "organization situation" in the area. It covered putting "a solid Communist Party group" in each of the local unions, getting out a monthly bulletin to raise the educational level and consciousness of the workers, amalgamating the local unions into one large union for closer control and supervision, and the method for paying dues to the Communist Party. [R. 207-210.]

PETERSON: The witness in 1947 and 1948 was a representative of Mine-Mill and a member of the Communist Party. [R. 212-213.] He testified to three so-called "Communist meetings" as follows:

(a) *Salt Lake City*, May or June, 1947—almost three years before the affidavit. After cross-examination, the witness changed that date to February 16, 1948, over two years before the oath. [See for original date, R. 213-215.][3] This meeting was held at the Hotel Utah during the pendency of a Mine-Mill conference and was attended

---

[3]The testimony on cross-examination was not printed.

only by Mine-Mill personnel who were "known" also to be members of the Communist Party. There was discussed the conflict within Mine-Mill between the "left" and the "right," disaffection problems within the union and opposition to the then pending Taft-Hartley bill. Jencks spoke in favor of fighting that legislation, especially the non-Communist affidavit provisions. [R. 213-219.]

(b) *Denver*, late 1947 or early 1948—over two years before the affidavit. This was a Rocky Mountain Convention of the Communist Party. Peterson and Jencks were put on a committee apparently created to promote the interests of Mexican-American people. The chairman of the convention, Arthur Barry, spoke of government encroachments on civil liberties and the duty of Communist Party members to resist these tendencies. [R. 219-224.]

(c) *Denver*, May or June, 1948—nearly two years before the affidavit. This was held in a Denver hotel room at the time of a Mine-Mill conference and was attended solely by union personnel. There was discussed secession movements in the union, the Progressive Party movement and the union position not to sign the non-communist affidavits prescribed in the Taft-Hartley Act. Jencks spoke, saying he had no fear of secession in the New Mexico area. [R. 224-227.]

ECKERT: In 1947 and 1948 this witness was, he says, a member of Mine-Mill and one of the four-man steering committee of the Communist Party in Mine-Mill. He claims he attended two "Communist Party meetings" with Jencks as follows:

(a) *Chicago*, August, 1947—two years and eight months before the affidavit. This meeting "was restricted

to members of the Communist Party" and consisted of Mine-Mill personnel plus the Communist Party State Secretary and Trade Union Secretary for Illinois. There was discussed the rival candidacies of two persons for an office in Mine-Mill. Jencks spoke in favor of one because he would carry out the instructions of the Communist Party. [R. 328-332.]

(b) *St. Paul*, August, 1947—two years and eight months before the affidavit. This was a "Communist meeting." Attending were Mine-Mill personnel and "a representative of the Communist Party from New York." Jencks reiterated his support for one of the contesting candidates but no statement of reasons was attributed to Jencks for this occasion. [R. 332-334.]

THOMPSON: This witness was formerly the printer for the publication of Local 890 called the "Union Worker." He said Jencks was the editor of it in October, 1949. He identified the edition printed in that month [G. 24] containing an editorial referring to the Taft-Hartley Act non-communist affidavit in which this sentence appears, "Now that our Union has signed the phony affidavits we can defend ourselves on a ballot in case of raids." [R. 372-373, 375.] In October, 1949, according to the evidence, the only "affidavit" signed by Jencks was the one dated October 15, 1949. [G. 7; R. 395.] Later the prosecutor argued that this was an admission that the 1949 affidavit was false. [R. 453.]

(b) The Post Affidavit Period.

TERRAZAS: This witness was a former member of Jencks' local. He testified to these things:

(a) During the years 1950, 1951 and 1952, Jencks stated to union meetings that everyone should buy a news-

paper called the Daily People's World, that this was the only paper that brought out the truth to the people, unlike other papers which were controlled by capitalists. [R. 348.] According to Matusow this was a "West Coast Communist Party newspaper." [R. 247.]

(b) That Terrazas was expelled from Local 890 because he fought against "Communism on the job and such as trying to walk out for nothing, things like that," and for this he was assailed for "attacking Mine-Mill." [R. 371.]

MATUSOW: This witness testified to four conversations with Jencks at a guest ranch in San Cristobal Valley, New Mexico. They all occurred in the period late July or early August, 1950—some three months after the affidavit.

(a) *The conversation with Jencks and Marcus* July 15, to 20, 1950—Matusow, Jencks and one Marcus were unloading books from Matusow's car, and while doing so they discussed the Community Party. Matusow said he had left New York permanently and was thinking of living either in New Mexico or California, adding that he would transfer his Communist Party membership to either of those places. Jencks' reply was, "It is a good idea, we can use more active Communists out here." [R. 244-246.]

(b) *The conversation about "Do-Day" and the Korean War*—Jencks again expressed approval of Matusow's proposed transfer to New Mexico, saying, "we can use you out here, we need more active Party members." Jencks asked Matusow what he and other Communists had done in New York in relation to the Stockholm Peace Appeal. Matusow told of efforts to get signatures on peace petitions and to raise money in street meetings and canvassing neighborhoods. He described a "Do-Day" which was

one day a week set aside for activities rather than meetings; Jencks replied that this was a good idea and he would bring it back to some of his "fellow Party members in Silver City." In response to Matusow's request for information as to what "he and other Communists" were doing about the Peace Appeal, Jencks told of conferences with leaders of the Mexican Miners Union to get common expiration dates on collective bargaining contracts in the United States and Mexico so as to cut off production or slow it down for the Korean War effort. [R. 245-246.]

(c) *Jencks' lecture at the Ranch, August 7 or 8, 1950*—Jencks merely spoke of the role of trade unions in the prive for peace and what the witness (not Jencks) characterized as "the Communist-sponsored Stockholm Peace Appeal." Jencks spoke favorably of the Soviet Union's plan for atomic and other disarmament and putting an end to the Korean War in which he called the United States the aggressor and where he said this country had no business. He referred to the "do-day" notion. Jencks also asked the people present to read the Daily People's World which the witness described as a "Communist newspaper." [R. 246-250.]

(d) *The conversation concerning ANMA "about the time of the lecture"*—Matusow told Jencks he had joined the Taos chapter of ANMA, and Jencks replied that this was proper Communist Party concentration work. He added that he was active in ANMA in Silver City, that it was a key organization as far as Communist activities were concerned in New Mexico, and that the Communist Party controlled ANMA and used it as a political sounding board. [R. 251.]

It is significant that, after this testimony, the prosecutor thought it necessary to ask Matusow whether Jencks in any of these conversations *identified himself as a Communist Party member.* [R. 251.] An objection to the form of the question resulted in the court putting this interrogation, "You will answer whether or not Jencks said whether he was a Communist." Immediately the prosecutor said, "I will withdraw that." [R. 252.]

Denial of Access to Informer Reports to F.B.I. Made by the Witnesses Matusow and Ford Contemporaneously With the Events and Transactions Covered in Their Testimony.

At the time he went to the San Cristobal Valley Ranch Matusow was a member of the Communist Party and was reporting his observations and activities to the F.B.I. [R. 289.] Although he was evasive as to the frequency and completeness of his F.B.I. reports,[4] he had previously testified that during the period of his work as an informer within the Communist Party he reported to the F.B.I. "a minimum of once a week" and "in writing" [R. 290] and that he put in his reports "everything that I remembered I saw and heard." [R. 290-291.] He gave his recollection as "completely" as he could. [R. 291.] While at San Cristobal he said he gave both written and oral reports. [R. 292.]

---

[4]In earlier cases Matusow had described his reports to the F.B.I. as "complete." Upon production of one of them pursuant to court order he was confronted with the fact that several of the things covered in his testimony were not even mentioned in his "complete" report. [See R. 255-257, 260-263, 266-267.] The case referred to is *United States v. Flynn, et al.*, Case No. C-136-27, United States District Court, So. Dist. N. Y. Aff'd, *United States v. Flynn, et al.* (2d Cir.), 216 F. 2d 354, cert. den. 348 U. S. 909.

It also developed that he had testified twice before about his encounters with Jencks at the Ranch and that on neither of these occasions had he mentioned the conversation with Jencks and Marcus, the "Do-Day" conversation or the one about ANMA. [R. 294-295, 309-310.] He could not recall what he put in his informer reports. [R. 310.]

Upon this foundation petitioner moved [R. 295-296] for an order requiring that the witness' reports to the F.B.I. concerning matters which he saw or heard at the Ranch during the period that he was a guest there and covered by his direct testimony, be produced to the court for examination and inspection, that the court inspect the reports to determine whether they had any evidentiary value in this case for purposes of impeachment, and that if they have that value they, or the relevant portions, be made available to the defense for purposes of cross-examination. This motion was denied. [R. 302.] Defendant then asked that the government be required to turn over the reports to the court and that they be sealed for purposes of the record on appeal, so that the ruling might be subject to proper review on appeal. This motion was overruled. [R. 302.]

Ford remembered that he "reported to the F. B. I. on every meeting." [R. 170.] He could not recall whether the reports he gave on the meetings he testified to were written or oral. [*E.g.*, R. 178, 185, 193.] He made his reports as soon after the meeting as he could, "while things were still fresh in [his] memory." [R. 140.]

Defendant moved for production and inspection of Ford's reports to the F.B.I. on the same grounds and under the same conditions urged in connection with the Matusow reports. [R. 321-322.] The motion was denied. [R. 322.]

Instructions.

1. Membership.

"In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member of the Communist Party on April 28, 1950." [R. 415-416.]

2. Affiliation.

"I have said that the second count of the indictment contains the same essential element as the first count, except that the charge is that the defendant was affiliated with the Communist Party instead of charging that he was a member of the Communist Party. Webster's New International Dictionary defines 'Affiliate' as follows: 'To connect or associate one's self with; to adopt, hence usually to bring or receive into close connection; to ally; to unite or attach such as a member or branch.' Affiliation, as used in subsection (h) of Section 159 of Title 29 of the United States Code, means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both." [R. 417.]

3. Findings Jury Was to Make.

"The questions for the jury to determine are:

"First, whether the alleged statements of the defendant if he made them are false.

"Second, whether the defendant knew or should have known that these alleged statements were false.

"Third, whether the alleged statements of the defendant were made willfully—bearing in mind the instructions on the element of willfulness that I have given you in these instructions." [R. 415.]

4. Credibility of Informers.

"The witnesses, Jerry W. Ford and Harvey M. Matusow, have testified that for a period of time they received money for services and expenses in furnishing information to the Federal Bureau of Investigation, and you may consider that circumstance when you pass upon the weight and credit which you give them as witnesses, but you are the sole judges of the credibility to be given their testimony. You may take into consideration all the facts and circumstances in determining what weight you shall give their testimony and you are the sole judges thereof." [R. 418.]

Proceedings on the Motion for New Trial.

Following entry of judgment in the District Court, petitioner, on January 28, 1955, filed his motion for new trial. [H. 2-6.] It was made under Criminal Rule 33 (Fed. R. Cr. Proc., Rule 33, 18 U. S. C. A.), based upon the ground of newly discovered evidence and supported

by an affidavit of the witness Matusow dated January 20, 1955. [H. 7-12.] That evidence consisted, in brief, of a complete recantation by Matusow of his trial testimony.

After hearing, from March 7 to March 12, 1955,[5] the motion was denied. [H. 825.] The grounds for denial were that nothing had been developed at the hearing to cause the trial judge to change his "opinion" about "the trial and the testimony and the evidence . . . treated as a whole" or to "doubt. . . . the correctness and the justice of the trial, and of the verdict." [H. 818-819.] The judge immediately thereafter held Matusow in contempt for obstructing justice by making a false recantation. [H. 819-820.] From this we now take it that the real basis for denying the motion for new trial was that the trial judge disbelieved the recantation.

The Evidence on the Motion for New Trial.

Matusow's recantation was complete and detailed. He did not repudiate or qualify any portion of it under battering cross-examination. In brief, it was to the effect that he never had any discussions with petitioner concerning "Communist Party membership or Communist

---

[5]The hearing was, with Petitioner's agreement, set so long after the filing of the motion in order to afford the government the time it requested to make its investigation. In the interim there occurred a lengthy hearing before Judge Dimock on Matusow's recantation in the *Flynn* case, where substantially the same issues were raised by the government concerning Matusow's credibility (*United States v. Flynn*, D. C., S. D. N. Y., 130 F. Supp. 412), an inquiry by the grand jury of that court, as well as by the Senate Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary. (See Hearings, Feb. 22, 1955, 84th Cong., 1st Sess.) Matusow testified at the hearing on the motion that, of the preceding 30 days, he had spent 17 in testifying about his recantation and the events leading up to it and that the "questions are almost identical." [H. 644.]

Party activities" [H. 29, 30, 32, 33, 34, 37, 38, 40, 42, 47, 48], and that there was no basis for Matusow's stating that Jencks was a member of the Communist Party. [H. 10.] In Appendix I there is set out a tabular comparison of the pertinent portions of Matusow's trial testimony and recantation testimony.

The hearing was given over largely to the government's massive attack upon Matusow's credibility. He was subjected to long and searching cross-examination. Witnesses were produced who touched upon one or another aspect of Matusow's story, and others testified in an apparent effort to corroborate his original testimony at the trial. While his credibility, as such, is not an issue here, we summarize in Appendix II Matusow's story chronologically, inserting the testimony of the other witnesses at the proper places in the sequence.

The government's thesis at the hearing was that Matusow had told the truth upon the trial and had lied in recanting as the result of corrupt inducement moving from petitioner and his union. Its assault upon his credibility followed four main courses (the references below to Items are to the numbered paragraphs in Appendix II):

(1) Before testifying at the trial Matusow had on four occasions testified to substantially the same facts as those given by him at the trial. The prior occasions were the House Committee on Un-American Acativities in February, 1952; the McCarran subcommittee in October, 1952; the grand jury that indicted Jencks in April, 1953; and the Texas Industrial Commission in December, 1953. [Items 1, 2, 7 and 13.)

(2) A transcription of Matusow's tape recording (Item 45) in connection with writing his book [G-9] as well as a draft of the text thereof (Item 49) are inconsistent with his recantation.

(3) Following Matusow's admissions of having given false testimony to Bishop Oxnam and Attorneys Brown and Norvell (see Items 15, 16, 17) he made statements contrary to those admissions and endorsing his prior testimony.[6] These include his July, 1954, testimony to the House Committee on Un-American Activities (Item 21), his conversations with Golden, the Mormon missionaries, and Messrs. Daly, Connors and Koffsky of the Department of Justice. (Items 35, 36, 41, 43.)

(4) Matusow, impecunious before being contacted by those who ultimately published his book, was given money to induce a false recantation. (Items 29, 32, 33, 34, 37, 39.)

---

[6]After these men had made public Matusow's admissions of having "borne false testimony and desires to publish a book on the 'World of McCarthy'" for which he had told them he needed a publisher's advance of $1500, petitioner's counsel decided to get a publisher to assist Matusow. (See Judge Dimock in *United States v. Flynn* (D. C., N. Y.), 130 F. Supp. 412, 416.) Contact with a publishing house in New York was made and money paid it for expenses by way of advance purchase of copies of the book if one eventuated. Matusow undertook to write the book for an advance against royalties of $1500. He was contacted by the publishers at Taos, New Mexico, while engaged on a bicycle trip from Dallas. At the time he was low in funds. Mine-Mill paid the publisher a total of $3250 ($2000 of this after completion of the manuscript) by way of advance purchases. It made plans for extensive distribution of the book, for it sought vindication of itself as well as petitioner against the Matusow charges of plotting to cut off copper production for Korea. Matusow knew nothing of the Mine-Mill financial arrangements until after he had given his affidavit of recantation. [H. 631-638, 774-792, 788-789, 802, 803, 809-811, 233-234, 330, 378-400, 453.]

Denial of Access to F.B.I. Reports by Matusow at the Hearing on the Motion for New Trial.

On his redirect examination, and after the foregoing attack upon his credibility, Matusow testified that none of his contemporaneous reports to the F.B.I. made concerning his observations at the vacation ranch in July and August, 1950, indicated that he "had any conversations that established that Jencks was a Communist." [H. 662.] He said they would show that he "had no way of knowing who were or were not Communists, including Mr. Jencks" and that he "never at any time identified Mr. Jencks as a member of the Communist Party in the reports [he] turned in to the F.B.I. in that period when [he] was reporting."[7] [H. 661.] Petitioner asked that the government be required to produce these reports to the court for its examination to determine their relevance to the issue of fabrication in the recantation, only the relevant portions to be inspected by petitioner. [H. 663.] The request was denied. [H. 664.]

Early in his cross-examination Matusow testified that in late August, 1953 (intermediate his testimony to the Grand Jury and his testimony at the trial of petitioner) he had spoken to an agent of the F.B.I. at Santa Fe, New Mexico, stating that he did not want to testify in the Jencks trial, that "I didn't feel my testimony was honest . . . I didn't want ever to testify and especially

---

[7]This is of no little significance in light of the refusal of the prosecution at the trial, noted earlier, to permit Matusow to answer the question framed by the judge, "You will answer whether or not Jencks said whether he was a Communist." [R. 252.]

in the Jencks trial that was coming up." The agent wrote down what Matusow said and showed it to Matusow who approved it. [H. 67-69.] The court was requested to order that the F.B.I. records embodying what Matusow said be produced to the court for its inspection to determine its relevance on the issue of the truth of Matusow's testimony at the hearing, the relevant portions to be made available to petitioner. The request was denied. [H. 107, 147.]

Summary of Argument.

1. The contemporaneous informer reports of the witnesses Matusow and Ford should have been produced at the trial in accordance with the terms of petitioner's motion. It was the proper function of the trial judge to determine their relevance for impeachment and thereby protect all legitimate interests of the government. It was not incumbent upon petitioner, under *Gordon v. United States,* 344 U. S. 414, to make a showing of contradiction between the reports and the testimony, as a precondition to production to and inspection by the judge. To impose such a requirement would place the search for truth at the mercy of the witness, who, as in this case, is at best suspect from the beginning.

2. Matusow's contemporaneous informer reports should have been produced, under the procedure just outlined, at the hearing. Matusow was then petitioner's witness, recanting his trial testimony, and his recantation was attacked by the government as a recent fabrication corruptly induced. The reports were proper and relevant to

rehabilitate Matusow from this attack. Further, production and inspection of the reports, as the best available evidence of the facts in issue, were necessary to satisfy the court's responsibility to find the truth out of a "fastidious regard for the honor of the administration of justice."

3. By essentially the same reasoning petitioner's motion for the production of a memorandum of interview between an F.B.I. agent and Matusow, held intermediate the grand jury proceedings and the trial, in which Matusow said that he did not want to testify at the trial and that his grand jury testimony was dishonest, should have been granted. This memorandum together with the contemporaneous informer reports might have shed light on whether perjurious testimony was knowingly used at the trial.

4. The instruction on membership utterly failed as a statement of legal criteria to guide the jury. It failed to convey the meaning of membership as a legal principle or to explain the significance of evidence that might manifest that the crucial "act of joining" had been consummated. It left the issue entirely at large upon all the evidence. In this fashion it deprived petitioner of a jury trial and invaded the legislative power of Congress. It permitted a finding of membership on pre-affidavit evidence alone (thereby conflicting with the gloss upon the statute enunciated in *American Communications Assn. v. Douds*, 339 U. S. 382, 413-414), and rested upon a presumption of continuance that was both arbitrary and

a subversion of the presumption of innocence. For all these reasons and because it permitted a finding of membership from constitutionally protected speech and association, the instruction applied the statute as a dragnet without an ascertainable standard of guilt. The language of the charge was in such conflict as to mislead or confuse the jury on the key question of whether they had to find knowing falsity or falsity which petitioner "should have known."

5. The instruction on affiliation suffers all the defects of that on membership. Additionally it defined affiliation in a manner in conflict with this Court's holding in *Bridges v. Wixon,* 326 U. S. 135, 142 ff., by failing to require either the needed closeness and reciprocity of duty or alliance for proscribed purposes.

6. The instruction on credibility of informers was deficient in that it failed to afford the jury adequate criteria by which to determine the credibility of hired informers. It neither advised the jury of the low estate of such persons as a matter of law or of the standard by which their testimony is to be adjudged.

ARGUMENT.

POINT ONE.

The Court Below Erred in Affirming the Ruling of the Trial Court, Which Denied Petitioner's Request for an Order Requiring the Government to Produce the F.B.I. Reports to the Court for Its Determination as to Relevance and Making Available to Petitioner Such Reports as Were Relevant.

(a) Petitioner's Request, at the Trial, With Reference to Matusow's Reports to the F.B.I. Which He Was Employed to Make and Did Make Contemporaneously With the Transactions Covered in His Direct Testimony.

The facts summarized *ante*, pp. 14-15, amply warrant the conclusions that frequent and regular reports were made by Matusow in the course of his employment as informer for the F.B.I., that these reports dealt with the subject matter of his direct testimony, and that they had been delivered by him to the government. The reports were, in effect, Matusow's contemporaneous recordings of the occurrences he witnessed or participated in. As such they were as much admissions by him as signed statements given to government investigators. The time period of the reports was from between July 15 and 20 to August 7 or 8, 1950. [R. 244, 246, 251.]

Petitioner's motion asked for the production of narrowly described documents, namely, the reports made by Matusow of the things he saw and heard at the guest ranch and covered by his direct testimony. Since Matusow said he reported at least once a week, the number of reports asked for was probably slightly in excess of

three. Petitioner asked only that the reports be produced to the trial judge so that he could examine them and determine whether they had evidentiary value for impeachment purposes. Petitioner sought access only to those portions of the reports having this value. The motion therefore proposed no broad foray into the government's files and afforded the judge every opportunity to protect the government's legitimate privilege as to the matters not connected with this case.

This Court has observed that where "the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." *Gordon v. United States*, 344 U. S. 414, 417. That policy applies with special force to the case at hand. Even the prosecutor admitted that Matusow's testimony was "absolutely essential." [H. 13.] The government's burden was to convince the jury that petitioner had knowingly falsified his denial of connection[8] with the Communist Party as of April 28, 1950. Only Matusow's testimony speaks of the period after that date.[9] All the rest speaks of a period nine months to four years before that date. As we shall show in Point Two, *infra*, the pre-affidavit evidence, standing alone, was insufficient as a matter of law

---

[8]We use this term as a shorthand for "membership in and affiliation with."

[9]His credibility had been sharply attacked at the trial. On two prior occasions of testimony concerning Jencks, Matusow had failed to mention three of the four incidents related at the trial. [R. 294-295, 309-310.] A quondam hired informer and renegade Communist, he had turned his revelations into money as an expert on anti-Communism and campaigner for Senator McCarthy. [R. 311-319.] His repeated lies about his residence had been used to obtain improper voting privileges [R. 269-275] or jurisdiction for a divorce action [R. 279-280] or to obtain travel money he was not entitled to. [R. 282-283.]

under *American Communications Assn. v. Douds, supra.* The court below found the evidence sufficient only upon "the Government's total proof." (226 F. 2d at 547.)

Given these circumstances all information that would assist a discriminating appraisal of Matusow's trustworthiness was an undeniable prerequisite to the fairness of the trial. The trial court's action resulted in withholding facts that might have had inestimable value[10] in impeaching this key witness, already suspect. The Court of Appeals in the Second Circuit holds that under these circumstances the government must produce the reports. Where it is not possible for the accused to show the contradiction before the document is produced, it must be produced to the court for it to determine whether it is relevant for impeachment purposes. If it is so relevant the accused must be allowed to inspect it. *United States v. Krulewitch*, 2 Cir., 145 F. 2d 76, 79; *United States v. Cohen*, 2 Cir., 145 F. 2d 82, 92.[11]

The Court of Appeals in the Ninth Circuit has held even more broadly. *Fisher v. United States*, 9 Cir., 231 F. 2d 99. There the court held a defendant in a similar

---

[10]As contemporaneous records of the matters they recite, prepared under directions and in accordance with a practice to be all-inclusive, the reports were perhaps the best evidence of those matters—superior to the unaided recollection of the witness given three and one-half years later. 3 Wigmore, *Evidence*, 3d ed., p. 76, Sec. 738. Even their failure to report the incidents covered in the direct would have amounted to an "assertion of their non-existence." Wigmore, *op. cit.*, p. 733, Sec. 1042.

[11]Indeed under the holdings of that court the accused is entitled to production of documents in possession of the government which have any relevance to the issues being tried, whether for impeachment or otherwise, and it is for the trial court to examine the documents and give the accused access to those which are relevant. *United States v. Beckman*, 2 Cir., 155 F. 2d 580, 584; *United States v. Andolschek*, 2 Cir., 142 F. 2d 503, 506.

case was entitled to receipts given by an informer witness for money paid by him by the F.B.I. over a period of eleven years. The purpose of the request was to impeach the informer's testimony that he and his wife had served their ignoble role only out of patriotic motives by showing that they had been paid for their services above and beyond their out-of-pocket expenses. Apparently the court held that the receipts should have been turned over directly to the defense without prior examination by the trial judge. (231 F. 2d at 104.) In the *Fisher* case, as in *Krulewitch* and *Cohen*, it is apparent that the appellate court was heavily influenced by the fact that the witness sought to be impeached was, as here, crucial to the government's case.

In an impressively reasoned opinion, Judge Mathes of the District Court, Southern District of California, held that a defendant in a Smith Act prosecution is entitled to production of the informer's contemporaneous reports covering the incidents testified to on direct. *United States v. Schneiderman* (D.C., Cal.), 106 F. Supp. 731. He followed the procedure, approved by the Second Circuit, of production to the trial judge for *in camera* inspection to determine the evidentiary worth of the documents. Central to the holding are two important considerations intimately related to the sound administration of justice: *First*, that the motion for such production must be considered in light of the Sixth Amendment guaranty that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." (106 F. Supp. at 735.) *Second*, that the Attorney General, as the officer in charge of the prosecution, labors under the duty to see that "justice be done" and to that end may not withhold from the court "evidence essential

to proper disposition of the case, including *a fortiori* any evidence which may be material to the defense of the accused." (106 F. Supp. at 739.)

In sustaining the trial judge the court below held, under *Gordon v. United States*, 344 U. S. 414, that petitioner was not entitled to have the reports produced as requested unless he first showed they were inconsistent with the direct testimony. (226 F. 2d at 552.) The Court of Appeals misconceived the holding in the *Gordon* case. There the accused developed on cross-examination that the government's principal witness had given several statements about the criminal transactions in which he did not implicate the defendant. Upon this showing the defendant requested production of the statements. It would appear that the accused's motion was for direct access to the documents. (344 U. S. at 417-418.) This Court held that upon the foundation there laid such production was necessary. Here, on the other hand, there was no showing of contradiction and the accused therefore made a different request. The trial court in this case was asked to require the production of the documents *to it* so that *it* could inspect them and give petitioner access only if the contradiction appeared. The *Gordon* opinion does not reach this situation. It was not presented there, and this Court explicitly confined its holding to the facts there appearing. (344 U. S. at 418.)[12]

There are strong reasons for not requiring the showing of contradiction before production is made to the

---

[12]The Court of Appeals also relied on *Bowman Dairy Co. v. United States*, 341 U. S. 214, and *Goldman v. United States*, 316 U. S. 129. (226 F. 2d at 552, n. 19). Those cases deal with pretrial production of real evidence, not extra-judicial statements of a witness called by the government. They appear to have no application here.

trial judge for his determination of evidentiary value. Such a showing was expressly held unnecessary in *Krulewitch* and *Cohen, supra,* as it was in *United States v. Mesarosh* (D.C. Pa.), 116 F. Supp. 345, 350. In *Fisher* and *Schneiderman, supra,* the issue was apparently not raised. The production of the document initially to the trial court protects all of the government's legitimate interests. The government's interest in limiting or barring inspection is obviously a three-fold one: to prevent fishing expeditions into its files and the consequent interference with the functioning of its agencies; to protect the prosecutor's privilege against disclosing names of informants or other matters that would cripple its law enforcement activities; and to protect state secrets.[13] The first of these objectives is served by reasonable requirements as to specificity of description in the defendant's motion. See *United States v. Mesarosh, supra.* Surely that was accomplished here as it was in *Krulewitch, Cohen, Fisher* and *Schneiderman, supra.* The governmental privileges, covering state secrets and prosecutor's information, is waived by bringing the action (*United States v. Andolschek,* 2 Cir., 142 F. 2d 503, 506; *United States v. Beckman,* 2 Cir., 155 F. 2d 580, 584; *United States v. Coplon,* 2 Cir., 185 F. 2d 629, 638) so far as the documents con-

---

[13]Other than as above indicated the government's only interest can be in the production of such evidence as to secure the doing of justice in the case. ". . . the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the state has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it." *People v. Davis,* 52 Mich. 569, 573-574, 18 N. W. 362.

tain matters of evidentiary value. The request, made here, that the reports be first handed to the trial judge to determine which of the contents had that value, provides full protection to the government. It is thereby required to show the defense only those things, as to which it has waived its privilege by bringing the action. Since here the evidentiary value of those things is their inconsistency with the witness' direct, the foundation of contradiction is in fact laid before the document can reach the eyes of the defense.

On the practical side there are equally cogent reasons for not requiring a showing of contradiction before the government is required to show the documents to the court. For such a precondition must of necessity largely frustrate the search for truth precisely where the need for probing cross-examination is greatest. In this case we deal with a hired informer and professional witness who testified to uncorroborated oral admissions, the weakest and least reliable of evidence. 4 Wigmore, *Evidence*, 3d ed., p. 17, section 1056; 7 Wigmore, *op. cit.*, pp. 466-477, section 2094. The very factor that renders the informer so untrustworthy, viz., his interest in preserving his source of income as spy and witness (see Point Four, *infra*), demonstrates the unlikelihood of his frank admission that a prior report belies his testimony.[14] But aside from propensity to protect his livelihood and his hirer, the informer may honestly say that he does not remember the contents of a report written several years before. He might not be able to recall having written one. But if the reasoning of the court below were adopted, the at-

---

[14]In the *Gordon* case, *supra*, the witness was apparently a criminal but not an informer in the career sense that Matusow served. (See *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 120.)

tempt to obtain the impeaching material would be halted *in limine* by the mere word or faulty recollection of a suspect witness.

In the case at bar precisely this situation is presented. The examination designed to establish the contradiction between the reports and Matusow's direct testimony was blocked by his reply. He was asked, "Did you put anything in your written reports to the F.B.I. about 'doday,' "[15] and he answered, "I don't recall what I put in my reports two or three years ago, written or oral, I don't know what they were." [R. 310.] It was thus impossible to establish the contradiction even in general terms and further inquiry would have been futile. It would indeed make a mockery of the judicial pursuit for truth if it could be frustrated so easily, and perhaps with complete dishonesty. This is more impressively the case when one considers that the government must know what the report shows. If it supports Matusow's trial testimony, production cannot hurt any governmental interest. (*Cf., Fisher, supra,* at p. 104.) Since the trial court's examination of the document to ascertain relevancy will protect such interest, the government's insistence on such empty formalities as it here asserts appears to be either advantage-seeking in a game of wits or unwillingness to let the District Court exercise a sound legal discretion.

The developments since the trial show that the mere possibility of obtaining an admission of contradiction can

---

[15] Plainly a failure to refer to this most inflammatory incident of his entire testimony would have established a contradiction because under the circumstances it would have amounted to an "assertion of [its] non-existence". Wigmore, *supra*, n. 10. The question was also preliminary to inquiry about the contents of the report in the event of an affirmative answer.

be made utterly dependent on the witness and the complex interplay, within him, of the pressures of interest. In recanting, Matusow admitted that his contemporaneous reports not only contradicted his trial testimony but showed that he had no basis for calling Jencks a Communist. [H. 661.] Assuming, *arguendo*, the government's position that the recantation was corruptly induced the demonstration of the effect of interest is complete. While he was a professional informer-witness he supplied the government with what it needed and gave answers, like the one above, which blocked efforts to impeach him by his own prior statement.[16] When he moved over to the opposing camp he gave them what was needful in destroying his trial testimony. The document itself on the other hand would provide an objective measure of truth, speaking of a time when the influences of interest were least and memory sharpest. [See R. 310.] Empty technicalities opening the door to the caprice of questionable witnesses should not be allowed to bar access to the most reliable guide to the truth.

(b) Petitioner's Request, at the Hearing on the Motion for New Trial, With Reference to the Same Reports.

At this proceeding Matusow testified as a witness for petitioner and recanted his trial testimony. On cross-examination his recantation was attacked as a recent fabrication corruptly induced by petitioner or others acting in his interest. On redirect he testified in effect that his contemporaneous reports to the F.B.I. belied his trial testimony and supported his recantation. The facts

---

[16]At the trial Matusow was obviously prepared to parry, and if possible frustrate, examination about his reports. Earlier experience with the same cross-examiner had alerted him to the danger of impeachment. [See R. 255-267.]

are summarized, *ante*, pp. 21-22. It was at this juncture that petitioner made a new motion that the reports be produced; this, substantially in the same form as at the trial. [H. 663.] The judge denied the motion [H. 664], saying that the government need not "produce anything from the secret files of the F.B.I." [H. 664.]

It would appear that petitioner had done all that could reasonably be asked of him to lay a foundation that (a) the reports existed and were in the possession of the government, (b) they were Matusow's own reports, (c) they were consistent with the recantation and contradictory of the trial testimony, (d) they were contemporaneous with the events they record, and (e) they were made long prior to the facts relied on by the government to show corruption or other motive for fabrication.

Upon this foundation the reports had obvious relevance. As part of his redirect they were admissible to rehabilitate Matusow as extra-judicial statements consistent with his direct testimony at the hearing and made prior to the facts showing fabrication or motive to do so. *Ellicott v. Pearl*, 35 U. S. (10 Pet.) 412, 439. This rule of admissibility has found general acceptance. 4 Wigmore, *Evidence*, 3d ed., pp. 203-207, sections 1128, 1129. Under the decisions of the Court of Appeals for the Second Circuit the exclusion of such a statement in a civil case is reversible error. *Gelbin v. N. Y., N. H. & H. R.R. Co.*, 2 Cir., 62 F. 2d 500, 502. This kind of evidence is the more valuable when, as here, the rehabilitating declaration is provided by the witness himself, thus permitting cross-examination of the declarant. *Di Carlo v. United States*, 2 Cir., 6 F. 2d 364, 366; *Beaty v. United States*, 4 Cir., 203 F. 2d 652, 656.

The foundation laid having so plainly indicated the relevance and the admissibility of the reports, the least

that was called for was that, under the decisions of the Second Circuit cited in subdivision (a), *ante*, the reports be produced to the judge so that he could verify their relevance and turn them over to petitioner. Indeed, upon this Court's holding in *Gordon v. United States*, the reports should have been made available directly to petitioner.

There is a compelling reason of policy why the trial court should have ordered the reports produced at least to it. The trial court is vested with a special responsibility to satisfy itself that the recantation is true. For it is under a duty both to see that justice is done to an accused as well as to protect its own judgments. *United States v. Johnson*, 327 U. S. 106, 112-113; *Larrison v. United States*, 7 Cir., 24 F. 2d 82, 88; *Martin v. United States*, 5 Cir., 17 F. 2d 973, 976; *Gordon v. United States*, 6 Cir., 178 F. 2d 896, 900. The recantation standing alone raised grave questions of perjury either at the trial or at the hearing, and these were aggravated, not settled by the government's attack upon it as a fabrication. Perjury taints the judicial process as perhaps nothing else. The situation facing the judge was one where "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party v. Subversive Activities Control Bd.*, 351 U. S. at 124.[17]

The reports offered the surest path to the needed certainty. We have already noted why almost five years

---

[17]Matusow is one of the three witnesses against whom there was an uncontested challenge of perjury in that case, 351 U. S. at 123.

after the events they are the best evidence of the transactions they record. (See p. 27, n. 10.) The judge denied himself use of these reports in the discharge of his high responsibility. In this he abused his discretion.

Additionally, the trial court's ruling eliminated a significant inference against the government at the hearing. It was the government which then asserted that Matusow lied. It was the government which had possession of Matusow's contemporaneous reports. For the reasons already given those reports were either the best evidence of the fact in issue or the strongest evidence then available. The government had not produced those reports, and the judge's ruling was that it was "not required to." [H. 664.] Thus did the judge prevent himself from drawing against the government and in favor of petitioner an inference from the former's failure to produce stronger evidence within its power to present. Such a failure is itself "evidence of the most convincing character." *Interstate Circuit v. United States,* 306 U. S. 208, 226.

This being a matter which invokes the supervisory functions of the Court, we direct attention to the disparity between the procedure followed by the trial judge, and sanctioned by the court below, and that followed by Judge Dimock in *United States v. Flynn* (D.C., N.Y.), 130 F. Supp. 412.[18] There (almost simultaneously with his re-

---

[18]In addition to the instance recited in the text, the writer of this brief represents, on the basis of his own participation, that a similar difference exists on the trial records in the two cases. In *Flynn* (conviction affirmed (2d Cir.), 216 F. 2d 354, cert. den. 348 U. S. 909), Judge Dimock granted the defense motion for production of one of Matusow's F.B.I. reports. He examined it and released to the defense such portions as were, by affirmative assertion or by non-assertion, contradictory of the witness' direct. If the government contests this statement, petitioner will upon notice produce the pertinent excerpt from the *Flynn* record.

cantation here.) Matusow recanted his trial testimony in a Smith Act case, and at the hearing on the motion for new trial the government offered the same facts to show fabrication. But there Judge Dimock concluded that the trial testimony was "the lie." (*Idem.*, p. 416.) This, because he examined the F.B.I. reports (essentially similar to the ones sought by petitioner below) together with memoranda of interviews by government lawyers and found a pattern of embellishment in accordance with "Matusow's propensity to lie." (*Idem.*) We are of course not here concerned with whether Matusow lied at the trial or in recanting. But it is more than coincidence that the different conclusion by Judge Dimock followed upon resort to the F.B.I. reports. The failure here to employ this usual and accepted instrument for ascertainment of truth reflects a disturbing disregard of law protecting those accused of crime.

The court below affirmed the action of the District Court on what appears to have been two misconceptions. The first of these is that in the appeal from the motion for new trial petitioner simply "repeats the argument" made on the appeal from the judgment. (226 F. 2d at 560.) The second is that on the appeal from the denial of the motion, so far as access to F.B.I. records are concerned, petitioner rested "largely" upon a motion for production which is discussed in the next subdivision of this Point One.

In both of these respects the Court of Appeals was mistaken. Petitioner addressed a new motion for production to the trial judge at the hearing on the motion for new trial. [H. 663.] That motion sought production of the same documents and in accordance with the same procedure as the motion made at the trial. The relevancy of the documents, however, turned on quite different con-

siderations as above outlined. Moreover the motion just described is quite a different one from that dealt with in the next subdivision. The motion at H. 663 requested the production of Matusow's contemporaneous reports which he said he had delivered to F.B.I. agent Burttram. [H. 661.] The nature of the motion the court below referred to will appear below.

For all the reasons here indicated the complete frustration of petitioner's efforts to obtain limited access to the reports in question was a grave deprivation of a fair hearing. Without Matusow's testimony the government's case could not approach the nodal point of legal sufficiency. His reference to stopping copper production for the Korean War was inflammatory. It is of the essence of the right to defend that one be permitted reasonable scope in destroying the credibility of the witnesses against him. This is the more compellingly true when, as in the case of Matusow, the witness made a profession of so testifying and his testimony consisted only of uncorroborated oral admissions, by nature the least reliable of evidence. At the trial petitioner was denied this opportunity on the very subject matter of the witness' testimony. At the hearing on the motion for new trial, the judge deemed the recantation to be untrue without giving petitioner access to the one item of evidence that might have been determinative of the question. The Court of Appeals regarded the recantation as the product of "the machinations of evil men." (226 F. 2d at 559.) But both courts reached these results without the benefit of the most reliable searchlight for truth. If petitioner is to be punished for a crime and denounced as a procurer of fabrication, the least that elemental fairness requires is that his judges resort to the most trustworthy facts afforded by the cir-

cumstances. Short of this, there cannot be the requisite certainty that justice has been done. The proceedings in this case reflect neither justice nor the appearance of justice; there is a cloud upon the judgment.

(c) Petitioner's Request, at the Hearing, for the Record of Matusow's Interview With the F.B.I. Agent at Santa Fe.

The facts concerning this matter have been summarized *ante*, pp. 21-22. This is a motion distinct from the one at H. 663. It was directed to a memorandum of an F.B.I. agent at Santa Fe, New Mexico, in 1953, prepared for Matusow and approved by him.

The document was relevant for rehabilitation purposes to the same extent as the contemporaneous report. Its existence was developed on cross-examination of Matusow during the government's effort to prove that the recantation was a recent fabrication. The record, if it contained what Matusow said it did, tended to corroborate the recantation. It was permissible rehabilitation because it would speak as of a time antedating the facts allegedly showing fabrication or the motive to do so.

But here also far more is involved, for the situation again called for certainty that the taint of perjury had not darkened the proceeding. If Matusow had in fact told the government, before testifying at the trial, that his grand jury testimony was "dishonest" [H. 68], there is then presented an acute issue as to the government's conduct of the trial. For such a statement by Matusow would have put the government on notice of possible falsity in his testimony. The most natural and necessary starting point for the required investigation of the witness whom the government was about to sponsor would have been the contemporaneous reports to the F.B.I. If, as Matusow stated at the hearing, these reports failed to

assert the facts he was about to testify to at the trial, or asserted facts showing he could not know what he was about to testify to at the trial, his worth as a witness would have been destroyed. Then, if notwithstanding such developments he had nevertheless been presented by the government at the trial, grave questions would be raised as to whether, at the trial, the government had used testimony which its agents knew or had reason to believe was perjurious. This in itself would have necessitated a new trial. *Mooney v. Holohan,* 294 U. S. 103; *White v. Ragen,* 324 U. S. 760, 764.

We of course are not in a position to, and we do not, charge that this is what the government did. We do assert that the court's ruling blocked off a vitally serious line of inquiry pertinent to the question whether Matusow lied at the trial or on the motion for new trial. With Matusow's statement that he had admitted falsity to the F.B.I. agent [H. 68], together with his admission that his F.B.I. reports failed to mention Jencks and showed that he did not know that Jencks was a Communist [H. 661], more than enough was put before the trial court at the hearing to require the fullest investigation into both what Matusow knew the truth to be and the government's awareness of Matusow's knowledge. To preclude such inquiry, while purporting to be engaged in the pursuit of truth, is nothing less than arbitrary.

The court below affirmed on one ground, *inter alia,* that Matusow's testimony about the F.B.I. interview gave "only a vague hint of dishonesty" while the F.B.I.

agent gave an entirely different version which the trial court "was justified in accepting." (226 F. 2d at 561.) The court failed to perceive that the real issue was the existence of a third version, the one in the report. This had a greater likelihood of accuracy and reliability as a contemporaneous record, than the memories (nearly two years later) of two obviously interested witnesses. Another ground for affirmance was the asserted authority of the lower court's decision in *Shelton v. United States*, 5 Cir., 205 F. 2d 806, 814. There the trial court had refused to release to an accused a witness' statement to the F.B.I. The case has no application. The witness was an accomplice and it was conceded that the report corroborated his testimony. Production was sought on the ground that the report contradicted earlier action and oral statements of the witness "not incriminating the defendant." The situation there does not remotely resemble this case. Finally the ruling of the Court of Appeals rests on the assertion that this Court in the *Gordon* case requires a showing of inconsistency before the government has to produce the document. In subdivision (a) above we have shown why the *Gordon* rule does not apply, and is not needed, in cases where the document is to be first produced to the court.[19] But in no sense can the *Gordon* case control a situation where the document is sought to rehabilitate a witness charged with recent fabri-

---

[19]That procedure, incidentally, was followed by the trial court in *Shelton*, and the document was denied the defendant only because the court's examination of it disclosed no relevance. (205 F. 2d at 814).

cation. In that situation, as here, the foundation is laid by the witness' testimony on redirect that the prior writing confirms his direct and was made before the facts claimed to show fabrication or motive to fabricate.

(d) Petitioner's Request, at the Trial, With Reference to Ford's Reports to the F.B.I., Which He Was Employed to Make, and Did Make, Contemporaneously With the Transactions Covered in His Direct Testimony.

The facts are summarized, *aute*, p. 15: This is a situation in all respects similar to the motion at the trial for production of Matusow's reports. It is governed by the same principles as those set out in subdivision (a) above and they need not be repeated.

There remains only to point out the importance of Ford. His testimony is all pre-affidavit and for that reason is insufficient to support the verdict, under *American Communications Assn. v. Douds, supra.* On the other hand the court below in affirming the denial of the motion for new trial said:

> "There was ample evidence before the jury at the trial to warrant a conviction without the testimony of Matusow. We hold that, upon the whole record, it is manifest that the testimony without Matusow was so convincing that it is difficult to justify the thought that any other result could have been reached if Matusow had not been present as a witness." (226 F. 2d at 560.)

In affirming the conviction that court put primary emphasis on the pre-affidavit evidence. (226 F. 2d at 547, 549.) Of that evidence Ford's testimony was by far the most impressive. He testified to a series of five meet-

ings with petitioner. He named petitioner as an officer of the party for the period April to August, 1949, and provided admissions of petitioner as to how he functioned in that capacity. If the pre-affidavit evidence, taken alone, has any significance in the case, Ford's carried the most weight.

Moreover, the government attempted to project Ford's testimony past the affidavit date. He testified that he remained an officer of the party until September, 1950, and that in that time Jencks was not "replaced in his position on the State Board" [R. 133] and that no disciplinary action was taken against Jencks in Jencks' presence. [R. 115, 119.] That Jencks was not replaced of course is no proof that he remained in the position. That he was not disciplined in his own presence is not evidence that his connection, if any, with the party did not otherwise terminate. But the prosecutor made much of the testimony to convince the jury of petitioner's membership on the affidavit date. [R. 457.]

Petitioner was entitled to have the reports examined by the trial judge and made available if they provided impeachment material.

POINT TWO.

The Court Below Erred in Approving the District Court's Charge to the Jury as Well as Its Refusals to Charge on the Issue of Membership.

The charge which was given on the issue of membership is set out *ante*, p. 16. Defendant's requested charge is found at R. 462.

(a) The Charge Was an Abdication by the Trial Court of Its Responsibility to Guide the Jury by Appropriate Legal Criteria.

Membership is not a self-defining term, and the common understanding provides no clear single meaning. Faced with the necessity of comprehending and applying the legal meaning of membership and determining whether the status existed at a particular point in time, the jury was given no guidance at all. The instruction provided no legal principle defining membership in a voluntary association, prescribing its elements or describing how it is begun or how continued. Additionally, the instruction contained no yardstick in terms of the kind of conduct which would evidence the fact that such a relationship had been entered into and was subsisting on the critical date.

The court ignored the legal principles usually operative in defining and evaluating the membership relation. It is generally accepted law that membership in a voluntary association is consensual and that the act of joining and of acceptance as such is manifested by compliance with the formalized requirements of membership laid down by the organization itself. (See *United States v. Reimer*, 2 Cir., 79 F. 2d 315; *Fisher v. United States*, 9 Cir., 231

F. 2d 99 (membership in the Communist Party); *Smith v. Kern County Medical Assn.*, 19 Cal. 2d 263, 120 P. 2d 874 (membership in a professional society); *Chapman v. American Legion*, 244 Ala. 553, 14 So. 2d 225 (membership in a service organization); *Kubilius v. Hawes*, 322 Mass. 638, 79 N. E. 2d 5 (membership in a church); *Traders Mutual Life Ins. Co. v. Humphrey*, 109 Ill. App. 246 (membership in a fraternal order).) But of course so general a formulation can be given meaning for present purposes only in terms of the specific conditions of membership in the particular organization under inquiry. At the trial the prosecutor's expert, Eckert, testified that "during the years 1945-1950" the Communist Party had a constitution which contained "provisions dealing with the conditions for obtaining and retaining membership." [R. 408.] The government made no effort to prove that constitution, and the record contains no evidence as to the conditions for membership actually observed by the party.

The trial judge refused to charge, as requested by petitioner, that "joining the Communist Party is a mutual arrangement between a particular person and the Communist Party. . . . The burden is on the prosecution to prove beyond a reasonable doubt what the conditions were for membership in the Communist Party and that the defendant accepted those conditions on or before April 28, 1950." [R. 462.] By such a standard the jury could have been directed to find whether there had been an "act of joining" (*Douds*, 339 U. S. at 411); which satisfied the consensual requirements recognized in law. There is not a word in the charge which by so much as implication directs the jury's attention to this aspect of membership.

On the other hand where, as here, the charge does not utilize the standard of compliance with the formal requirements but attempts standards predicated upon conduct that manifests the existence of the relation, the vagueness of the membership concept presents serious difficulty. This Court found fatally vague a statute penalizing "Any person . . . known to be a member of a gang" on the ground, *inter alia*, that the statute failed to indicate "what constitutes membership" or "how one may join." *Lanzetta v. New Jersey*, 306 U. S. 451, 458. Here we deal with a political and propaganda organization wherein the status of membership is notoriously lacking in contour and scope. Speaking of such membership, Professor Chafee has correctly observed, "It is not a matter of record like being a stock holder in a business corporation. Or take a club. A man is elected to it, he pays regular dues, he resigns in order to stop his dues; but in these propaganda enterprises, joining and leaving are very informal and dues are either loosely collected or non-existent. If one comes to dislike new associates or new purposes, he just stops doing anything. . . . ." (Chafee, *The Blessings of Liberty*, 1956, p. 243.) As respects the specific propaganda organization called the Communist Party, the views of Congressional specialists and the Attorney General, as well as provisions of substantive law, show that the term membership has been responsibly viewed so broadly as to extend beyond those who have fulfilled the act of joining to those who evince ideological similarity or parallel advocacy.

The House Committee on Un-American Activities has stated that persons "accepting Communist Party discipline" may be "either secret members or outsiders," and in either case "may be recognized by the regularity with

which" they follow the party's "line." (*Guide to Subversive Organizations and Publications*, (1951), p. 5.) The attorney General has said that party "membership [often is] provable [principally or only] by circumstantial evidence of party line activity or association." (100 Cong. Rec. 15112.) The Communist Control Act of 1954 (Act of Aug. 24, 1954, c. 886, 68 Stat. 775, 50 U. S. C. A. 841 ff.), while not explicitly defining membership in the Communist Party, does describe (50 U. S. C. A. 844) evidence which "shall" be considered by the jury in prosecutions under it. These provisions embrace such obviously protected conduct and expression as conferring with officers or members of the organization in behalf of any of its plans (subdivision 6); communicating directives or plans of the organization (subdivision 8); preparing publications "in behalf of the objectives of and purposes of the organization" (subdivision 9); sending or delivering to others "material or propaganda of any kind in behalf of the organization" (subdivision 10); imparting "information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the organization" (subdivision 11); indicating "a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization" (subdivision 12). Congressional debate elicited at least two observations that this section defined membership. (Rep. Feighen at 100 Cong. Rec. 14849, and Rep. Dies at 100 Cong. Rec. 14849 and 15237.) Commentators have taken a different view. (23 U. of Chi. L. Rev. 173, 182, n. 28; 64 Yale L. J. 712, 750.)

From all that has been said on the meaning of membership, when viewed apart from compliance with the organization's formal requirements, it is fair to conclude

that laymen jurors cannot function without specific judicial guidance. The vice of the trial court's charge is that it gave no direction as to the kinds of conduct relevant to show the existence of the growingly amorphous membership relation. It did not advise the jury that any particular conduct need be found. The jury was told, "You *may* consider" and thus was left free to consider or not the matters thereafter mentioned. The jury was thus permissively told it could consider pre-affidavit attendance at Communist Party meetings and holding office in the party. The significance of either of these items in relation to establishing the act of joining or the existence of the membership relation at the crucial time was not explained. An isolated act of attendance at a party meeting would doubtless be of no value to prove the act of joining. So also a spasmodic attendance, irregular and with long absences in between. The very least that would seem necessary is a course of such conduct over a sustained period. But even that raises additional problems (discussed in subdivision (b), *infra*) as to the inference to be drawn from such conduct concerning membership as of a substantial period of time after the conduct was last shown to have occurred. Here the jury was allowed, not directed, to consider attendance at meetings without any specification as to the number or frequency thereof or the regularity of attendance.

The theory of the prosecutor in presenting his case [R. 3] and of the trial court in ruling on the evidence [R. 85] was that membership would be shown by a course of continuous conduct from March 1946 "up to and through April 28, 1950." The case was argued to the jury on the same basis. [R. 442, 447.] This charge, however, lays down no requirement that the jury find

the course of conduct to be continuous for any period of time. The words, "You may consider whether or not he attended Communist Party meetings" left it to the jury to consider attendance at any one meeting at any particular time, or any combination of meetings at whatever separation of time.

But over and above these deficiencies the instruction disastrously misled the jury. For it authorized a finding of membership predicated upon the character of meetings as "Communist Party meetings" in the absence of probative evidence of that fact. It did so at large without differentiation as to the description in the evidence of the kind of meeting or the competence of the witness to characterize it. Currie [R. 86], Ford [R. 101, 102, 109], Peterson [R. 214, 216, 224] and Eckert [R. 328, 330, 332] all testified to attendance at meetings which were described equivalently as "Communist meetings" or attended only by persons who were "known" to the witness to be Communists. In *Bridges v. United States*, 9 Cir., 199 F. 2d 811, 836, the effort to prove Communist membership by evidence of mere attendance at meetings confined to Communists was dismissed as circular reasoning which "assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at which every other person present was a Party member." In *United States v. Holton*, 7 Cir., 222 F. 2d 840, 844, evidence to prove that the accused was a Communist by testimony that he worked on a foreign language newspaper where "only persons who are Party members are hired to work" was held to be without probative value. The instruction, then, invited a finding on membership without legal evidence. Additionally

the instruction, by virtue of its assumption that the meetings described in the evidence were in fact "Communist Party meetings," in effect found them to be such. In this it was egregiously improper since it deprived petitioner of a jury's finding on this important issue of fact.

However uninformative and misleading the portion of the membership charge so far discussed, the balance of it left the issue wholly at large. The jury was told, "You may consider . . . . whether or not he engaged in other conduct consistent only with membership." [R. 416.] That kind of conduct was completely undefined, and the jury was left to its own judgment to decide what that conduct was. All semblance of legal guidance was destroyed utterly and finally by the concluding language of the instruction, "[you] may consider . . . all other evidence . . . which bears or may bear upon the question of whether or not he was a member. . . ." Having failed to delineate in any manner the question of judging "membership" either as a matter of proof or of definition, the court left it to the jury unguided and in arbitrary will to act and proceed as it might. Having failed to advise the jury on the probative effect of attendance and holding office, the charge invited the jury to roam at will through the maze of the evidence and select whatever satisfied their personal notions of what the membership relation consisted of.

Not the least important result was that the jury was permitted to find membership upon such uncertain bases as parallelism of action between petitioner and the Communist Party, or statements of ideological preference. He was a candidate for Congress on the Progressive Party ticket, working closely with and seeking the aid of the Communist Party in the campaign. [R. 100-101.]

As a union organizer he conferred with a Communist Party representative to discuss plans for strengthening his union with the help of the Communist Party. [R. 207-210.] Along with many other representatives of his union he worked to defeat the Taft-Hartley bill [R. 213-219] and to resist and seek the repeal of the legislation once enacted. [R. 224-227.] According to Terrazas petitioner urged his fellow union members to read a "Communist" newspaper. [R. 348.] Matusow said petitioner spoke in favor of the Stockholm Peace Appeal and of ending the Korean War, as well as endorsing a disarmament plan proposed by the Soviet Union. [R. 246-250.] Brooks related a front porch conversation wherein petitioner said he "was a Communist and proud of it.". [R. 201.]

By the instruction the jury could have found membership by any or all of this evidence alone and without relation to any other evidence. Indeed it could have based a finding of membership on any single part or any combination of parts of that evidence. That our contention here is not exaggerated is shown by the tests of parallelism or "following the line" formulated by the House Un-American Activities Committee and Attorney General Brownell referred to earlier. By such means the test of membership is transmuted from an "act of joining" into an ideological litmus applied to a sampling of a man's thoughts and conduct in public debate.

To the extent that the charge permitted the jury to reach its verdict on such evidence, it served grossly to mislead them. For that evidence has no probative force to establish membership. In *Bridges v. United States, supra*, at p. 834, instructions of law were especially approved declaring that membership in the Communist Party

could neither be proved nor constituted by mere parallelism of ideas and conduct or sympathy of viewpoint.

In our system the "traditional duty" of a trial court includes "guiding the jury by indicating the considerations relevant to the latter's verdict on the facts." *Bruno v. United States*, 308 U. S. 287, 293. It is the judge's "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Upon this "depended" the discharge by the jury of its "responsibility for drawing appropriate conclusions from the testimony." *Bollenbach v. United States*, 326 U. S. 607, 612. The judge should "bring into view the relations of the particular evidence" (*Bird v. United States*, 180 U. S. 356, 361), "resolving the evidence, however complicated, into its simplest elements, and . . . showing the bearing of its several parts and their combined effect [lest] chance, mistake or caprice may determine the result." *Nudd v. Burrows*, 91 U. S. 426, 439.

These principles are not empty formularies. They reach deep into the very essence of our institutions. Ambiguity, critical omissions, or affirmative errors in instruction, when amounting to a failure fairly or accurately to guide and confine the jury by the standards of judgment created by the substantive law, license the jury to create its own standards of judgment and punishment, *ad hoc* and *post facto*, or leave guilt to utterly unguided chance or passion. Such a course violates fundamental constitutional rights and principles; there is at once a violation of substantive and procedural due process of law, an infringement upon legislative power, and a denial of right to a meaningful jury trial. The central safeguard against these results is firm observance of the principle that the jury must take the law from the court. These consider-

ations were reviewed at length in the definitive decision of this Court in *Sparf v. United States,* 156 U. S. 51.

> "Upon the Court rests the responsibility of declaring the law; upon the jury the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the Courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights." (156 U. S. at 102-103.)

The trial judge in a criminal prosecution is "not a mere moderator" but is "the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States,* 289 U. S. 466, 469; *Herron v. Southern Pacific Co.,* 283 U. S. 91, 95. No part of his task is heavier than charging a jury. This is not a mechanical process of mouthing formulas or legalistic "abracadabra." It is rather "the weightiest influence upon the jurors," serving to "guide their understanding." *Andres v. United States,* 333 U. S. 740, 765, Mr. Justice Frankfurter concurring.

Where, as here, the instruction purports to inform the jury on the meaning of a statute, lack of the requisite guidance partakes of the identical vice as vagueness in the statute itself. It "licenses the jury to create its own standard in each case." *Herndon v. Lowry,* 301 U. S. 242, 263. It constitutes an interpretation and application of the statute, sweeping within the ambit of proscription conduct which, until the moment of the verdict, no reasonable person could say was prohibited. *Musser v. Utah,* 333 U. S. 95, 97. It permits a judgment to rest equally upon conduct which government may not pro-

scribe as well as that which it is competent to punish. *Terminiello v. Chicago*, 337 U. S. 1, 6. The result, of course, is the very antithesis of our aim of a society ordered by law. The verdict rests on the motions of the jurors, unsupported by any prior pronouncement of standard as a general rule for all to observe. *Cf., United States v. Cardiff*, 344 U. S. 174, 176.

These conclusions give new content to the adage that ours is a government of laws not of men. For the vague instruction leaves it to the jury to set the standard, not the legislature or the courts. As this Court has observed, in those premises "jurors will be superior to the . . . legislature" and will possess "power to abrogate or to make laws nugatory." *Sparf v. United States, supra,* at pp. 70-71.

Moreover failure to secure an informed and understanding jury trial under instructions guiding and confining the jury by the applicable substantive standards of law, denies a defendant the reality and the lawful substance of a jury trial. Without submission of the issue of guilt under correct and adequate instructions there is no holding of a jury trial, and the constitutional right to such has been denied. The accused is entitled to the verdict of a jury fairly instructed. This cannot be replaced, as the court below attempted (226 F. 2d at 547), by the conclusions of an appellate court as to what can be spelled out of the record to support a conviction. *Bollenbach v. United States*, 326 U. S. 607, 613-615; *M. Kraus and Bros. v. United States*, 327 U. S. 614, 628; *Bihn v. United States*, 328 U. S. 633, 637-639; *Kotteakos v. United States*, 328 U. S. 750, 763-764; *Weiler v. United States*, 323 U. S. 606, 611; *Screws v. United States*, 325 U. S. 91, 107; *United Brotherhood of Carpenters v. United States*, 330 U. S. 395, 410.

(b) The Charge Permitted the Jury to Find Membership Solely on the Basis of the Pre-affidavit Evidence and Was Therefore in Conflict With This Court's Construction of the Statute in American Communications Assn. v. Douds, 339 U. S. 382, 413-414. It Violated the Presumption of Innocence and Permitted Drawing From Innocent Prior Membership an Arbitrary Inference of Continued Membership Having Criminal Consequences.

Ninety per cent of the evidence pertaining to petitioner's connection with the Communist Party relates to a period long prior to the date of the affidavit. Of this the earliest [Currie, R. 86] was four years before, and the latest [Ford, R. 109] was about nine months before the crucial date of April 28, 1950. It would be fair to say that the instruction invited a finding of membership on pre-affidavit evidence alone. The jury was told it "may consider" attendance at party meetings and holding party office. The only evidence dealing with these matters was pre-affidavit. The balance of the instruction, leaving the question of membership entirely at large, surely permitted the jury to rest its finding on pre-affidavit evidence alone. That evidence, whether considered in totality or in any combination of its parts, was in law unable to support the verdict.

The instruction contravened the statute as authoritatively construed in *Douds, supra*. There this Court held that past membership in the proscribed groups was no ba to signing the affidavit and serving as a union officer. The aim of the statute was "to forestall future dangerous acts" which might be committed by persons who continued as members of those groups. Thus it was held that ". . . members of those groups identified in §9(h), are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing

the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in §9(h), is not a bar to resumption of the position . . . . there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit." (339 U. S. at 414.) For these reasons the statute was declared not to be a bill of attainder.

Since past membership is not a bar to executing the affidavit and holding union office, past membership, standing alone, cannot constitute proof of false swearing.[20] Otherwise the statute as construed by this Court would be a trap. This Court's gloss upon the statute is a limitation upon the scope of the statute and therefore upon the liability created under it when combined with 18 U. S. C. 1001. In criminal cases the accused is entitled to jury instructions which set out correctly the limits of liability created by the statute, irrespective of whether a reviewing court would take the view that the evidence clearly satisfies those limitations. For the accused must be convicted upon the jury's appraisal of the facts under proper instruction. *United Brotherhood v. United States*, 330 U. S. 395, 409-410.

Implicit in the trial court's instruction permitting a finding of membership as of April 28, 1950, on the basis of past membership as old as nine months to four years, is a presumption of continuance of the status of member-

---

[20]It is necessary to note here that in *Hupman v. United States*, 6 Cir., 219 F. 2d 243, upon which the court below so heavily relied, there was evidence that after signing the affidavit, the accused met with Party officials and accepted from them instructions to conceal his membership on account of his having signed. (*Idem* p. 247.) There is no such evidence here, and the *Hupman* case has no bearing on this issue.

ship once the same had been shown. It may be noted that the instruction would permit such a presumption to operate upon any single item of pre-affidavit evidence, no matter how slight or how remote. Notwithstanding the lower court's reliance upon what it described as "membership . . . over a period of years," petitioner's "many activities . . . in furtherance of its mission," "dedication so complete and conviction so deep" (226 F. 2d at 549), there was nothing in the trial court's charge that directed the jury first to find membership over a period of years or any of the other factors adverted to by the court below, before inferring membership on the crucial date. Currie's testimony alone would have supported the inference under the instruction.

This Court has had occasion to observe that the presumption of continuance is no magic amulet. It is only to aid reason, not to override it. The presumption is operative only when under the circumstances of the case it is reasonable. *Maggio v. Zietz*, 333 U. S. 56, 66. Here the circumstances make the presumption improbable and unreasonable. Assuming petitioner's membership in the Communist Party for some period prior to August, 1949, the continuance of that relation turned solely on his own volition. This Court can notice that late 1949 and early 1950 was a period of intense public feeling against Communists in this country, in which the very formation of the party was by a jury found to have been the product of a conspiracy to violate the Smith Act. *United States v. Dennis*, 2 Cir., 183 F. 2d 201,[21] aff'd 341 U. S. 494. Against this circumstance alone it can-

---

[21] Judge Hand there noticed the nationwide antipathy to members of the party and its effect on the fairness of the trial. 183 F. 2d at 226.

not be said that the inference of continuance of this purely voluntary relation has any greater probability than its opposite. The inference being that weak it could not prevail even in a civil case. See *Cleveland C. C. & St. L. R. Co. v. Starks,* 58 Ind. 341, 359, 106 N. E. 646, 652.

But the controlling consideration is that under the circumstances of this case the very drawing of the inference of continuance displaces the presumption of innocence. Petitioner's past membership, if such there was, was innocent. That membership would become tainted or take on the dynamic quality of an element of the crime here charged only upon signing the affidavit. But proof that a purely voluntary relationship was maintained when lawful will not help prove that it was continued after it became unlawful or had criminal consequence. *Wolf v. United States,* 8 Cir., 259 Fed. 388, 393; *Haywood v. United States,* 7 Cir., 268 Fed. 795, 806-807; *Kammann v. United States,* 7 Cir., 259 Fed. 192, 194-195.[22] In effect the inference of continuance here unlawfully placed upon petitioner the burden of proving his innocence and this from facts that in and of themselves raise no sugges-

---

[22] "We agree at once . . . that criminality can not be proved by proving innocence. . . . To illustrate: Take a time when malicious and premeditated homicide was not unlawful. During that time a person with premeditated malice takes the life of a human being by means of a certain poison. Because he has committed no crime, it is impossible that he should have had any criminal intent. Later a murder law is enacted. Under it the same person is charged with having taken, feloniously and with premeditated malice, the life of a human being by means of the same poison, presumptively he is innocent. Presumptively he intended, when the murder law was enacted, to respect and obey it. Against the presumption that he did not have the criminal intent to commit murder, the prior innocent homicide has no probative value." (*Haywood v. United States, supra.*) "But it cannot be presumed that a state of mind, entirely lawful at the time and not accompanied by expressions showing a willingness to violate law, will change into a criminal intent under a future statute." (*Wolf v. United States, supra.*)

tions of criminality. Proof of Communist Party membership by petitioner in August, 1949, and before, did not call for explanation because in terms of the charge here it had no "sinister significance." *Morrison v. California,* 291 U. S. 82, 90; *Tot v. United States,* 319 U. S. 463, 468-469. Nor can a burden of exculpation be cast on petitioner because he has "the better means of information." That rule applies only when the inculpatory inference from the fact proved (here past membership, wholly innocent) is a reasonable one. "But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible *only where the inference is a permissible one,* where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." (Emphasis added.) *Tot v. United States,* 319 U. S. at 469.

In sum, the operation of a presumption of continuance or the placing upon petitioner of a burden of exculpation is, in the circumstances of this case, bottomed upon utterly circular reasoning. That which is sought to be proved is membership as of April 28, 1950, with its consequences of criminality. Of this petitioner was presumed innocent. But this was permitted to be proved by evidence of long prior membership which was in law and fact innocent, and combined with no fact giving it criminal consequences. The instruction allowed presumed innocence to be overcome only by the presumed continuance of a lawful relation until it became unlawful. The inference was therefore unreasonable and impermissible as a matter of law.

The court below, 226 F. 2d at 549, sustained the judgment on the grounds that enough had been shown to impose on petitioner the burden of explanation. But what had been shown was innocent and without criminal consequences as a matter of fact and law. Under the *Tot* case no such burden could arise. The attempt to create it is as much circular reasoning as the effort to draw the inference of continuance.

(c) The Statute as Applied in the Instruction on Membership Was Rendered so Vague, Indefinite and Uncertain as to Afford No Ascertainable Standard of Guilt, and to Embrace Speech and Association Protected by the First Amendment.

We have shown that the court's instruction permitted a finding of membership as of April 28, 1950, only upon evidence of membership long prior to that date. On its face the statute requires a disavowal of membership as of the time the affidavit is executed, and the affidavit was in the present tense only. [R. 383.] As authoritatively construed, the statute (18 U. S. C. 1001 and 29 U. S. C. A. 159(h)) will not support a prosecution for false swearing based only on evidence of membership antedating the affidavit. Assuming petitioner's past membership as shown he could have made an "honest, untainted" oath on April 28, 1950.

Construed as it was by the trial court, however, the statute affords no ascertainable notice of its requirements. The statute becomes a trap for him who is so unwary as to rely on the plain meaning of its terms. It bears a hidden meaning not made manifest until the evidence is closed and the instructions given to the jury. Compare *Connolly v. General Constr. Co.*, 269 U. S. 385; *United States v. Cohen Grocery Co.*, 255 U. S. 81; *Herndon v. Lowry, supra.*

The lack of ascertainable standard is made evident by considering the absence in the charge of any definition of membership either in terms of a principle of law or evidentiary ingredients. For due process purposes we must view the trial court's construction of the statute in terms of the stiuation confronting one about to execute the affidavit. This Court has ruled that "no honest, untainted interpretation . . . is punishable." (339 U. S. at 413.) Surely it is reasonable for the potential signer to construe the affidavit word "member" according to the party's formal requirements of membership. This the more so if he is a past member who this Court has said is free to sign. Assume such a person is aware of these requirements, has continued friendly relations, cooperating with the organization on clearly non-proscribed objectives such as eliminating racial discrimination, objection to the Korean interyention, repeal of Taft-Hartley and dissemination of its newspaper. Because he no longer met the conditions of membership he could reach an "honest, untainted" conclusion that he was not a member and that he could with impunity sign the affidavit. An instruction to a jury that ignores the formal requirements and permits a finding of membership on the basis of a dictionary definition is for these reasons erroneous. *Fisher v. United States,* 231 F. 2d at 107.

The same conclusion must be reached concerning the charge here which ignores the formal requirements and permitted a finding of membership upon isolated and not necessarily related facts. Here the charge told the jury, "You *may* consider whether or not he attended Communist Party meetings, whether or not be held an office in the Communist Party . . ." (Emphasis added.) The jury was not told these were required criteria; they were told that it was permissive to consider these things and

therefore that they need not do so. But the question is whether, by the standard set in the charge, petitioner on April 28, 1950, about to put his name to the affidavit, could honestly have said, "Having attended meetings, having held office, knowing the conditions of membership and having terminated mine and ceased to comply with those conditions, I can honestly say that I am *not* a member." Patently he could have. The instruction fashioned out of the statute a trap to catch not simply the unwary, but also the advisedly honest man who answers as to the present by established criteria only to be adjudged by standards based solely on the past.

But this does not exhaust the sweep of the dragnet fashioned by the instruction. The jury was permitted to consider "other evidence consistent only with membership" and "all other evidence . . . which bears or may bear upon the question." [R. 416.] As we have shown this gave the jury leave to base its findings upon utterances and statements of ideology entitled to First Amendment protection and having no necessary relation to membership. Thus, his urging his union members to read a so-called Communist newspaper because it gave the truth about union matters [R. 348]; or his comments upon the Soviet disarmament plan. [R. 247.] A particularly aggravated instance is the testimony of Brooks that in 1947 petitioner said that "he was a Communist and proud of it." [R. 201.][23] Under the quoted language of the charge the jury could have found membership on such

---

[23]The word "Communist" was capitalized by the court reporter, not by the witness. For all that appears in the evidence it could have been spelled with a small "c". Surely communists exist without party connection as well as democrats.

evidence whether standing alone or in combination with other evidence. Each of these is plainly a part of free discussion so necessary to the functioning of representative government. *Stromberg v. California,* 283 U. S. 359; *DeJonge v. Oregon,* 299 U. S. 353. The charge permitted the jury to attach criminal consequences to such discussion and to this extent established a standard which no reasonable person could perceive. *Winters v. New York,* 333 U. S. 507; *Terminiello v. Chicago,* 337 U. S. 1.

The impact of such a dragnet upon the marketplace of opinion must, in the circumstances of this case, have an especially damaging effect. For we deal here with officers and leaders of labor organizations. That by their nature such groups are a form of expression and that they give significant direction and content to the development of American opinion is hardly open to question. (See *United States v. C.I.O.,* 335 U. S. 106, 121; *Thomas v. Collins,* 323 U. S. 516; *Hague v. C.I.O.,* 307 U. S. 496.) The statute here is frankly aimed at excising from union leadership persons identified only by association or opinion. In addressing itself to the constitutional aspects of this problem, this Court has expressed a willingness to assume that "Communists . . . carry on legitimate political activities." (*Douds,* 339 U. S. at 393.) In a not dissimilar situation it has held "Membership may be innocent." *Wieman v. Updegraf,* 344 U. S. 183, 190.

The operation of the statute here, consistently with our constitutional protections of expression and association, calls for the most delicate dissection with instruments of unexampled nicety. Where the proscribed organization carries on legitimate political activities, it is inevitable that the activities and utterances of its members will

closely resemble those of other groups. No organization concerned with politics operates in a vacuum so complete that its interests do not touch upon areas in which others are concerned. The effort to show membership or affiliation by parallelism of utterance or activity on causes must inevitably extend far beyond the groups and persons at which the statute is aimed. So broadly applied it is given a censorial effect upon the conduct and interests of the unions themselves as well as their leadership. No officer of a union will encourage his organization to pursue a cause in which Communists are active, nor will he personally pursue it, if such may become a test of the truthfulness of his non-communist affidavit.

We do not reach at bar whether the purposes and objects imputed to membership in *Douds* are consistent with the pronouncements of this Court in *Wieman*. We do confront the necessity of giving to both membership and affiliation contours and dimensions that embrace only the constitutionally proscribable. The imperatives of free political expression demand that both these relations be "narrowly drawn." As to membership they indicate the need for a test based upon the accomplishment of an "act of joining" based either upon compliance with the organization's formal requirements or upon carefully defined conduct manifesting that joining and no more. The very fact that in *Douds* this Court approved the imputation of proscribable purposes to the membership relation, dictates that the relation be carefully proved in the organization's terms and not in terms of perfectly lawful as well as constitutionally protected conduct.

So also, as will be shown in Point Three, *infra*, as to affiliation the rule of *Bridges v. Wixon* is designed to define a relation within the competence of the Congress to proscribe.

It is an essential to the recognition of the constitutional guarantees. Without it the concept affiliation becomes an enormous dragnet virtually self-applying. American radicalism, including the Communist sector, has never been so divorced from national political currents that it has not espoused causes that others have furthered and worked with many other individuals and groups. The trial court's instruction fashioned an ideological test incapable of workable limitation. We need only be reminded of the cry, "Twenty years of treason." The practical result, not simply the logical implication, of such an application of the statute is that before speaking and joining union members and officers must give each other ideological loyalty tests.

(d) The Instruction Was Vague and Misleading in Connection With the Requirement That the Jury Determine, and Confine Its Judgment to, the Accused's Meaning of the Critical Word Member.

The crime of which petitioner was accused is in at least one critical respect identical with perjury. Falsity is the essential element of each. This, in each, lies in the difference between the oath given and the accused's state of mind. The statute here speaks of "making and using any false writing or document *knowing* the same to contain any false . . . statement." (18 U.S.C. 1001.) The perjury statute condemns swearing to a matter "which he does not believe to be true." (18 U. S. C. 1621.) This Court has held that in a prosecution involving a non-Communist affidavit the question is whether "the affiant acted in good faith or knowingly lied." *Douds, supra*, at p. 413. The Second Circuit has assimilated a false swearing case under section 1001 and perjury under section 1621 as respects the element of contradiction be-

tween the accused's oath and state of mind at least for purposes of delineating the type of proof by which state of mind will be proved. *United States v. Remington*, 2 Cir., 191 F. 2d 246, 249, cert. den. 343 U. S. 907. Judge Bazelon of the District of Columbia Circuit has expressed the view that the identity of the element of falsity in the two offenses compels the application of the two witness rule to section 1001 prosecutions where based upon allegedly false oaths.[24] In *Fisher v. United States, supra*, the Ninth Circuit held to the contrary, conceding that "the question is a close one." (231 F. 2d at 106.)

The gist of the offense being the conflict between the oath as to a fact and the oathmaker's knowledge as to that fact, an essential inquiry is the accused's understanding of the terms used. *Fotie v. United States*, 8 Cir., 137 F. 2d 831, 842; *Seymour v. United States*, 8 Cir., 77 F. 2d 577, 582; *Luse v. United States*, 9 Cir., 49 F. 2d 241, 246; *Hilliard v. United States*, 5 Cir., 24 F. 2d 99.

The import of the foregoing is that in a claim of perjury or false statement there must be (1) a demonstrated and defined meaning, searched for and found by the jury, (2) this must be found as well to be the *defendant's* meaning, and (3) so understood and meant, the statement made must be wilfully false. Falsity in any other or abstract sense is not the issue. The offense "consists . . . not in swearing falsely and corruptly." "[If the accused] swore honestly to a fact or belief, with probable cause, *according to his own lights*, to the best of his be-

---

[24] *Gold v. United States* (C. A. D. C.) No. 12352, opinion filed April 19, 1956. Apparently unreported. Copy set out in Appendix III. Gold's conviction for filing a false non-communist affidavit was affirmed by an equally divided court. So far as we can ascertain Judge Bazelon was the only member of that court to file a "statement of his vote and his reasons".

liefs, he is not guilty of perjury, though his oath was really untrue." (2 Wharton's Criminal Law, 12th ed., pp. 1782 and 1786.)

Where words are ambiguous and vary in meaning to courts, lawmakers, Congressional Committees, and legal periodical writers, as at bar, it is reasonable to apprehend they are and were ambiguous in meaning, and even variable, to the jurors below and to the accused. Yet no instruction told the jury that the term "a member" must be found by them to have one meaning, an agreed meaning, and this, the *defendant's* meaning, before they might convict on finding falsity, if such they should. And it is of the essence of such a trial that this be made plain to and be apprehended by the jury, else the jurors act in finding guilt without concept or understanding of the crux and core of the crime charged.

On this score the charge is in hopeless confusion and conflict. At one point the jury was told:

> "The questions for the jury to determine are:
>
> "First, whether the alleged statements of the defendant if he made them are false.
>
> "Second, whether the defendant knew *or should have known* that these alleged statements were false.
>
> "Third, whether the alleged statements of the defendant were made willfully—bearing in mind the instruction on the element of willfullness that I have given you in these instructions." (Emphasis added.) [R. 415.]

On its face this language not merely failed to require that the jury search for and respect the *defendant's* meaning, and convict by it only, but, to the contrary, it invited predication of guilt upon negligence of the defendant, not knowledge, nor by *his* meaning of the crucial

term "member." Nowhere in its instructions did the court advise the jury it must seek for and abide by only the meaning of the affidavit term to the defendant. [R. 408-420.]

Earlier in the charge the jury was told that one of the "essential elements of the crime" was that defendant made the statement "knowing it to be false." [R. 413.] It appears that the court meant by this that the statement of the defendant must have been made deliberately and not by inadvertence or negligence. [R. 414, first, second and fifth paragraphs.] In none of this language does the instruction require the jury to find what meaning of the term "member" the defendant did in fact entertain at the time. But in any event these passages are hopelessly obscured by the language quoted earlier. For, having said that "knowingly" excludes negligence, the charge then tells the jury to determine "whether the defendant *knew or should have known*" of the falsity. Negligence as a basis of guilt, twice in terms excluded, was thus inserted into the case.

The quoted excerpt appears to be an effort by the court to descend from the general principles explained at R. 413-415 to concrete application in terms of the jury's specific findings to be made—"questions for the jury to determine." It was in thus concretising that the offensive language "or should have known" is found. This of necessity says that the jury could find that membership had a meaning separate from the petitioner's awareness and that he falsified if under the circumstances of the case he "should have known" that meaning. Whatever had been said about knowing falsity previously, it was reduced to that practical working term for verdict purposes. This conclusion is reinforced by the fact that

when the court came to the application of the reasonable doubt principle to various aspects of the case it did not advise the jury that a reasonable doubt as to petitioner's knowing falsity required acquittal. [R. 418.] So construed, the charge misled the jury on the key issue of knowing falsity.

Moreover, if not misled, the jury was surely at least confused. No body of laymen could be expected to derive reasonable guidance on this central issue of the case.

POINT THREE.

The Court Below Erred in Approving the Rulings of the Trial Court Concerning Instructions on the Issue of Affiliation.

The instruction given was set out *ante*, p. 16. The instruction requested by petitioner will be found at R. 463-464.

(a) The Trial Court Gave the Jury No Legal Guide on the Issue of Affiliation.

Ignoring for the moment the portion of the instruction stating affiliation may be equated entirely to membership, and considering only the remainder, it is plain that this instruction in net effect was no instruction at all, certainly no instruction of definition. Affiliation is described merely and exclusively in terms of *synonyms*, and these of the vaguest contours. Such synonyms are supplemented only by the broad homily, without confining meaning whatever, that affiliation is "something less than membership but more than sympathy." In substance this was no instruction of definition at all. Also, the Court respecting affiliation, just as in its instructions respecting membership, failed totally to give the jury any guidance, reasonable or fair or at all, as to the manner and mode

in law for evaluating and weighing the evidence received upon the issue. It left the issue wholly at large upon all the evidence that had been offered in the case.

In consequence of the foregoing the charge respecting affiliation failed to give the requisite guide to the jury on that issue. The analysis made in subdivision (a) of Point Two, *ante*, applies with equal force here. As in the instructions affecting membership, the instructions given and refused constitute at once a denial of due process, both substantive and procedural, an invasion of legislative power vested in the Congress, and a denial in substance of the constitutional guarantee to a jury trial. Here, as there, the jury was cast loose utterly unguided, with no standards of law measuring and determining the crucial term that marked the charged offense, or for weighing and evaluating in informed manner the evidence respecting such, and without criteria to direct them through the "maze of facts before it" (*Bollenbach v. United States, supra*, p. 613.)

In addition, the issues of membership and affiliation were hopelessly blurred by that portion of the dictionary definition incorporating the otherwise undefined term membership in the words "to unite or attach such as a member . . ." [R. 417.] This incorporated membership in totality into affiliation as a permitted (if not directed) meaning of the latter. In these lights the charge that "affiliation . . . means something less than membership . . ." is reasonably capable of being understood as meaning that whatever would prove or constitute membership would assuredly prove or constitute affiliation, and with room to spare. Absent such a meaning the last quoted clause directly conflicts with the dictionary definition in the instruction. In total the effect could have

been little short of bewildering upon a conscientious jury; to citizens less aware of their responsibilities, it was no more than a suggestion that, having read the indictment, they were to decide whether the accused is guilty.

(b) To the Extent That the Charge Contained Any Criteria of Affiliation, They Were in Conflict With Those Defined by This Court in Bridges v. Wixon, 326 U. S. 135.

In a portion of the trial court's language, derived from Webster's Dictionary, the verb "affiliate" is said to mean "to connect or associate oneself with; to adopt, hence usually to bring or receive into close connection; to ally . . ." [R. 417.] It lacks two important elements required to afford First and Fifth Amendment certainty. These are (a) relationship of continuous and mutual obligation, and (b) a working alliance to further proscribed objectives.

Regarding the continuity and mutuality of obligation necessary to constitute affiliation, this Court, by its own formulation or by adopting others', has given heavy emphasis to this limiting factor. It has referred to "'. . . a status of mutual recognition that he may be relied on to cooperate with the Communist Party on a fairly permanent basis . . .'" The relationship must have "'. . . an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith' . . ." It approved an analogy to the corporate fields and to charitable and political organizations, "'. . . not the casual affinity of an occasional similarity of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are

nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails' . . ." Bonds of cooperation and alliance do not constitute affiliation unless they "'entail continuing reciprocal duties and responsibilities.'" (326 U. S. at 142.)

The charge utterly omitted these requisites. It gave no quality to the words "connect" or "associate." "Close connection" carried no measure of the degree of closeness. Particularly lacking are the ingredients of continuing reciprocal duties and responsibilities as well as dependability and permanence. Wanting in these respects, the language of the trial court's charge was more likely to be read as embracing the very "*ad hoc* cooperation" and "friendly associations" this Court's definition was expressly meant to exclude. (326 U. S. at 142-143.)

An instruction virtually identical with that here at issue, and in a similar case, was found wanting on these grounds alone in *Fisher v. United States, supra*:

> "The question is whether the definition given by the trial judge was sufficient to get across to the jury the idea of a continuing reciprocal relationship involving duties and responsibilities. The proper test to apply is whether one could be convicted under the instruction which was given who was only in sympathy with the aims of the Communist Party, and who occasionally would, say distribute literature for it but without any obligation to do so or to continue to do so. He would have connected or associated himself with the Communist Party. He would be its ally . . . However, under the test of affiliation laid down in *Bridges v. Wixon*, he could honestly answer that he was not affiliated with the Commu-

nist Party. If the test of affiliation given in that case is still applicable, and unless the Government can distinguish the case, this instruction is erroneous." (231 F. 2d at 108.)[25]

Further, by this Court's standards even a relation of the closeness and dependability and with the mutuality of duty so far elucidated does not constitute affiliation. For such regularized cooperation with an organization in its wholly lawful objectives is not affiliation. (326 U. S. at 143.) The cooperation, however close, "must evidence a working alliance to bring the proscribed program to fruition." (326 U. S. at 146.) The charge is silent on this subject. By its words the jury was free to find connection or association or alliance for any lawful objective and by that token conclude that affiliation was shown.

The trial court could have included, and the court below should have required, a definition of the proscribed purposes which had to be the object of the affiliation described in section 9(h). In the *Douds* case, *supra,* this Court said that the "purpose" of section 9(h) was "to remove . . . the so-called 'political strike.'" (339 U. S. 388.) The Congress had reasonably found that "Communists and others proscribed by the statute had infiltrated union organizations . . . to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." (326 U. S. at 389, see also 393.) Further it was held that the end sought by the legislation was the elimination from union leadership of persons who, be-

---

[25]So far as counsel can learn the government has not sought review of that decision in this Court.

cause of their membership or affiliation or belief or support, are likely to resort to the political strike. (339 U. S. at 392-393, 403-404.) It was therefore to this end that the affiliation proscribed in the statute had to be directed. It was concerning affiliation of this kind that the jury should have been instructed.

Lacking this requisite the charge gave to the concept of affiliation the "dubious scope"[26] of which Mr. Justice Frankfurter spoke in the *Douds* case. (339 U. S. at 420.) For it opened the door to consideration by the jury of association for "wholly lawful activities." And on this score there is a striking similarity between the affiliation evidence in the case at bar and the evidence held in *Bridges v. Wixon, supra*, not to make out affiliation. There this Court rejected as insufficient Bridge's cooperation with "Communist groups for . . . lawful objectives" (326 U. S. at 145); here Jencks through his union and political party worked closely with the Communist Party upon such "wholly lawful activities" as the elimination of discrimination against Mexican-Americans and the defeat of Taft-Hartley. [R. 101, 214, 223, 224.] There Bridges advised his members to read "Communist literature" because it more truthfully reported labor news

---

[26]The successive conflicts of definition of the term among administrative officers and courts in the *Bridges v. Wixon* litigation (49 F. Supp. 292, 307; 144 F. 2d 927, 938, 941; 326 U. S. 135, 142 ff.) and the observations of Judge Major dissenting in *Inland Steel Co. v. National Labor Relations Board*, 7 Cir., 170 F. 2d 247, 262, but serve to set in stark relief the anomalous position of the prosecutor here who had to ask the jury to convict of a crime which he himself could not define: "The Court will charge you—there is some difference, I am not too sure what myself—but there is some difference in being a member of a party and being affiliated with it. They say, and I think the Court will charge you, that affiliation is something less than membership but is not just a sympathy with it. You've got to kind of work at it, or something." [R. 459.]

(326 U. S. at 146); here petitioner did the same. [R. 348.] Petitioner's associations are always described in the testimony as "Communist meetings" or attended only by persons "known" by the witnesses to be Communists. We have above shown (Point Two, *ante*) that this evidence has no probative force to show membership. But it does show association with others at least for the purposes discussed at the meetings. In all cases these were "wholly lawful"—*e.g.*, veterans affairs, Currie [R. 86-89]; Progressive Party or Mexican-American affairs, Ford [R. 100-101, 101-102, 109-110]; affairs of petitioner's union including opposition to Taft-Hartley, support of the Progessive Party, Peterson. [R. 213-219, 224-227.]

The existence of such evidence in the record made imperative a charge defining affiliation in accordance with the standards declared in *Bridges v. Wixon*. Lacking this, section 9(h) would be given so broad a sweep as to embrace ideas, program and utterances protected by the First Amendment. (326 U. S. at 148; compare *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88.) So applied the statute would define no ascertainable standard of guilt and operate as a pervasive censorship of trade union activity and expression. *Herndon v. Lowry*, 301 U. S. 242; *Winters v. New York*, 333 U. S. 507; *Thornhill v. Alabama, supra.*

(c) The Instruction Permitted the Jury to Find Affiliation Solely on the Basis of the Pre-affidavit Evidence and Was Therefore in Conflict With This Court's Construction of the Statute in the Douds Case, 339 U. S. 382, 413-414.

The affiliation instruction leaves it to the jury to find affiliation as of April 28, 1950, "from all of the evidence that has been offered in this case." [R. 417.] One of the respects in which such a charge left the question at

large was that upon either all the evidence of the pre-affidavit period or any portion or combination of portions thereof, the jury could have made its finding of affiliation. This charge, then, suffers all of the infirmities analyzed in subdivision (b) of Point Two, *ante*, and for the same reasons.

(d) The Instruction Failed to Require the Jury to Determine and Limit Its Finding to Petitioner's Meaning of the Critical Word Affiliate.

On this score the affiliation instruction, both by its own obscurity as well as by its link with the "questions for the jury to determine" [R. 415], is defective and erroneous in the same respects and for the same reasons as the membership instructions. All that was said in subdivision (d) of Point Two, *ante*, applies with equal force here.

Petitioner when signing the affidavit well might have reasonably and honestly concluded that speech, advocacy and association touching lawful subjects only would not involve him in affiliation with the Communist Party no matter how close the parallel between his and the party's position or how frequently he may have cooperated with party representatives on such matters. This the more so as to such speech and association carried on long prior to the date as of which he foreswore affiliation. This Court has evinced a profound solicitude to prevent the imputation to individuals of the purposes of a group with which he is associated, and to that end repeatedly required specific proof of personal knowledge. "Membership may be innocent." *Wieman v. Updegraf*, 344 U. S. 183, 190; *Schneiderman v. United States*, 320 U. S. 118, 136, 154-155. So also affiliation, and the opposite must be proved. *Bridges v. Wixon, supra.* The failure to require the jury to find on this score was fatal.

POINT FOUR.

The Court Below Erred in Affirming the Refusal of the Trial Court to Instruct the Jury, as Requested, to Approach the Testimony of the Paid F.B.I. Informants Herein With Caution and to Weigh It With Great Care.

The contention here is that in light of the posture of the record as it stood at the time the instruction was requested, and in view of considerations of public policy affecting the administration of criminal justice in the federal courts, it was reversible error to fail to furnish the jury with standards necessarily required in weighing the credibility of the paid professional FBI informants.

The trial judge instructed the jury that the credibility of these professional informers was to be measured by criteria applicable to ordinary witnesses [R. 419], adding only that the jury could "consider" the circumstances that the witnesses Ford and Matusow "received money for services and expenses in furnishing information" to the FBI. [R. 418.] The trial judge refused to instruct the jury, however, that they should approach such consideration of the testimony of these professional informers with "caution" and weigh the testimony "with great care." [R. 460.][27]

---

[27]Dictionary definitions of the word "caution" include: "to give notice of danger; to warn; an exhortation to wariness; careful attention to the probable effects of an act, in order that failure or harm may be avoided." *Webster's Int. Dic.* (2nd ed.). The word "great" means: "considerable in degree, as to use *great* caution." The definition of the word "care" includes: "to be on one's guard; serious attention of mind; heed; caution; concern; regard; heedfulness; watchfulness; pains; as take care."

It is submitted that the refusal of the trial judge to instruct as requested by petitioner was harmful error. This view is supported by the following considerations:

1. The testimony of the professional informers was plainly intended to bolster "a weak case." *Fiswick v. United States*, 329 U. S. 211, 220. There was no direct evidence establishing the commission of the offense by this petitioner as alleged in the indictment. As we have shown, the case against petitioner was bottomed entirely upon tenuous circumstances, with inferences piled upon inferences, with unexplained gaps in the testimony involving salient periods of time before and after the date of filing of the affidavit—and all under a legal theory which relied heavily upon untenable presumptions, ridden figuratively by the prosecution backwards and forwards in order to appear to be carrying the essential burden of proof. Conviction here depended largely upon conjecture and guesswork, suspicion and supposition, elements ordinarily insufficient to justify a verdict of guilt against an accused. 2 Wharton, *Criminal Evidence* (11th ed.), Section 922, p. 1604.

2. The case herein lies in fields in which there is a traditional skepticism and wariness towards the accusation—where the offense, serious in nature, is so easily charged, and the negative is so difficult to be proved, that the accusation should be clearly and fairly made out under appropriate legal safeguards.

The offense, if committed, smacks darkly of false swearing and fraudulent concealment, of sedition and subversion. See, *American Communications Ass'n, C.I.O. v. Douds*, 339 U. S. 382, 388-89. The affidavit requirement in the statute affects officers of trade unions and the rights of unions to use a governmental facility in controversies

with employers or rival trade unions. In such milieu, the opportunities for vindictive and self-interested accusations are extremely great. Here the over-zealous prosecutor, the mercenary informer, the unreconstructed employer and the ambitious rival find the opportunity for coercive and unfounded accusations. See, *Colyer v. Skeffington,* 265 Fed. 17, 26, 69 (D.C. Mass., 1920); May, *Constitutional History of England* (1880), vol. II, pp. 275-6; Commons, *History of Labor in the United States* (1918), vol. I, p. 403; vol. II, pp. 195-97, 337, 339, 415-16; Chafee, *Free speech in the United States* (1941), pp. 215-218, 277-80, 489-90. It is here on the contemporary scene that "spies and informers" find "rewards far more tempting than truth." Mr. Justice Black in *American Communications Ass'n, C.I.O. v. Douds, supra,* p. 447.

Nor should it be overlooked that the accusers in cases involving alleged Communists come wrapped in an aura of patriotism and righteousness most difficult to dispel before a jury itself charged with deep-seated emotions and passions. "Curiously enough, the political informant, spy, or agent provocateur is not now regarded with the same opprobrium as his brother who participates in other types of crime. Public opinion being what it is, his credibility is at a premium. His veracity count exceeds that of his more orthodox and less eccentric fellows. He may admit to all kinds of past knavery and mendacity but the greater his self-debasement the greater his claim to belief. That he now acts from patriotic motives is conclusively presumed." Donnelly R. C., *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 Yale L. J. 1091, 1126 (1951). See also, Chafee, *The Blessings of Liberty* (1956), pp. 95-7. With the

scales thus weighted, it does not appear to be unfair to urge that the trial judge here was in error in failing to give the jury the requested cautionary instruction.

3. In this case, moreover, the nature of the evidence adduced and the ruling of the trial court increased the opportunities for the fabrication of their testimony by the professional informers. As we have shown, the case was tried under the vaguest and most unconfined definitions of the key words in the statute—"membership" and "affiliation" in the Communist Party. The "act of joining" was not made crucial to the prosecution's proof, and the state of mind of the petitioner was not premised on his own understanding and knowledge. The testimony of the informers was not confined; and they were left free to give full vent to their imagination, to produce the conviction upon which their continued employment so largely depended.[28] The informers were, in short, under the theory of the case below, permitted "enormous power to imagine words which were never said." Chafee, *The Blessings of Liberty* (1956), p. 97.

---

[28]Note for example the prosecutor's question to Matusow, ". . . did Mr. Jencks, in those conversations identify himself as a Communist Party member?" When the trial judge confined the question to "whether or not Jencks *said* whether he was a Communist," the prosecutor immediately withdrew the whole matter. [R. 251-252.] In his trial testimony Matusow said that Jencks had stated he would take the "do-day" notion back to his "fellow Party members." [R. 246.] In recanting he testified that neither he nor Jencks mentioned the Communist Party in relation to "do-day". [H. 39, 40.] Matusow, at the trial, described Jencks' lecture concerning the "Communist-sponsored" Stockholm Peace Appeal. [R. 247.] At the hearing he said the words "Communist sponsored" were his embroidery. [H. 44.]

Similar inflation of fact was attempted with Ford. Perhaps the most blatant was the interrogation about whether Jencks was ever "replaced" or "disciplined" in his party position. [R. 115, 119, 133.] On analysis the testimony is meaningless (see *ante*, p. 43), but it creates a plausible surface appearance.

In addition, the actual evidence given by the informers was the weakest kind of testimony and ordinarily suspect. In the crucial post-affidavit period, reliance was necessarily placed entirely upon extrajudicial oral admissions assertedly made by petitioner to Matusow—admissions, it should be noted, not of membership in the Communist Party, but utterances from which such admissions were arbitrarily inferred. In the immaterial period prior to the filing of the affidavit, the informer Ford relied on the stock-in-trade of the professional witness—"closed communist meetings"—the last of which meetings was nine months before the filing date and from which evidence the inference of petitioner's membership in the Party was drawn and added to the presumption that the membership continued to the filing date in order to make out a case. (See, *Statement of Case, ante*, pp. 6-8.) See, *United States v. Ross*, 92 U. S. 281. Professor Wigmore states that "there is a general distrust of testimony reporting any extrajudicial *oral statements* alleged to have been made, including a party's admissions." *Evidence* (3rd ed.), vol. IV, Sec. 1056, p. 17. The learned author adds: ". . . . the great possibilities of error in trusting to recollection-testimony of oral utterances, supposed to have been heard, have never been ignored; but an antidote is constantly given by an instruction to the jury against trusting overmuch to the accuracy of such testimony" *op. cit.*, vol. VII, p. 468.

4. The requested instruction was neither novel nor unknown to judicial experience. In situations where the motives for fabrication of testimony were even less clear than in the instant case, courts have unhesitatingly given a solemn cautionary instruction to the jury. In the case of accomplices, for example, it is true that a motive to

fabricate testimony arises from the hope of lesser punishment or immunity, but at the same time, the accomplice is accusing himself and in that respect is "burning his bridges behind him." The regularly employed police officer who acts as an undercover agent usually holds his job whether or not a conviction is obtained in a pending case. The same is true in varying degrees with all regularly employed persons engaged in crime prevention. Yet, even in all such cases, the likelihood of false accusation and the possibilities of injustice to an accused have led the courts to warn the jury to weigh such testimony with caution. *Fletcher v. United States* (C.A. D.C.), 158 F. 2d 321; *Cratty v. United States* (C.A. D.C.), 163 F. 2d 844; *Fisher v. United States*, 9 Cir., 231 F. 2d 99; *Freed v. United States* (C.A. D.C.). 266 Fed. 1014; *Hostetter Co. v. Bower* (C.C. N.Y.), 74 Fed. 235; *Lett v. United States*, 8 Cir., 15 F. 2d 686; *Johns v. United States*, 10 Cir., 227 F. 2d 374. See also, *District of Columbia v. Clawans*, 300 U. S. 617, 630.

But here we deal with a different and distinct class of spy or stool pigeon. The employment here, although extended, is temporary in nature, casual and special. Far different problems of credibility are presented. These informants are frequently of doubtful character, their continued employment depending upon the number of convictions obtained. They are under great temptation to commit perjury and fabricate evidence, a temptation they are not likely to withstand. Donnelly, *Judicial Control of Informants, supra*, p. 1121. Unless they continue to produce evidence of a "Popish Plot" or a "Jacobin Cabal," they are out of work. Claude Bowers recently stated: "The paid informer informs for money. It is his business. If he finds nothing on which to inform, his business

suffers and his revenue is cut off; but if he has an active imagination and no conscience, he can manufacture evidence and count on the continuance of his revenue." *Jefferson and the Bill of Rights,* 41 Va. L. Rev. 709, 721 (1955).[29]

5. Specifically, in the case herein, all of the elements aforesaid combined to make the giving of the requested instruction a prime necessity. Moreover, other factors, implicit in this case, should be noted. The evidence of the witnesses Ford and Matusow, with respect to the separate matters to which they testified, was entirely uncorroborated. Indeed, there was no place in the testimony of any witnesses to support the testimony of any other witness that the incidents described by the latter actually occurred. Matusow's testimony concerning the critical post-affidavit period was legally barren of any support. Ford's own pre-1949 testimony was supported by none of the other witnesses, all of whom testified to conduct or utterances of petitioner at far remote times and places and of the vaguest and most insubstantial character. (See, Statement of the Case, *ante,* pp. 6-11.) The short of the matter is that Ford and Matusow were uncorroborated informers. See, *Arnold v. United States,* 10 Cir., 94 F. 2d 499, 505-8.

They were also highly paid professional informers, as the record makes plain Ford, R. 203; Matusow, R. 311-319. The case against petitioner depended substantially

---

[29] "The testimony of the informant and the temporary spy or stool pigeon clearly should be scrutinized with care. If a defendant requests a cautionary instruction in regard to their testimony he should get it and a refusal to so charge, where there is no corroboration, should be reversible error." Donnelly, *Judicial Control of Informants, supra,* p. 1122.

upon the testimony of these two witnesses, and in turn the usefulness of these paid informants depended entirely on their ability to make out a case. Their own advantage was clearly a strong motivation for their role as witnesses.

Further, since "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*McNabb v. United States,* 318 U. S. 332, 340), this Court cannot disregard, it is respectfully submitted, the notorious character of the witness Matusow. In the eyes of the public and agencies of government alike, Matusow has become the symbol of the cult of the "paid informer," with all the aversion and disdain which this appellation entails. See, *United States v. Flynn,* 130 F. Supp. 412 (D.C. N.Y., 1955), opinion of Dimock. J.; Matusow, *False Witness* (1955); *Hearing before the Subcommittee of the Senate Committee on the Judiciary to Investigate the Administration of the Internal Security Act,* S. Res. 58, 84 Cong., 1st Sess. (1955); *Editorial,* New York Times, February 5, 1955. And see, N. Y. Times, February 1, 1955—"Anti-Red Witness Confesses He Lied"; N. Y. Times, Feb. 16, 1955—"Matusow Admits Faking Blacklist"; N. Y. Times, Feb. 17, 1955—"Matusow heard on Oxnam Views"; N. Y. Times, Feb. 18, 1955—"Matusow Study Widened By U. S."; N. Y. Times, March 3, 1955—"Matusow Admits Lies Against 244."

Before this very Court, the stamp of perjurer was placed on the witness Matusow without denial by the United States. *Communist Party of the United States v. Subversive Activities Control Board,* 351 U. S. 115, 121. This Court returned the "tainted" record to the Board despite the Board's statement that "we have considered

that certain of [the Attorney General's] witnesses fall into the category of 'informers' and we have scrutinized their testimony accordingly, *supra*, p. 123, n. 5. Moreover, on remand, the allegations with respect to Matusow remained undenied by the United States, and his evidence was stricken from the record by the Board, the Board declining to hold a further hearing because "as to Matusow it would avail nothing as the board has previously ruled that his credibility was such that it would disregard his testimony *in toto*." N. Y. Times, Aug. 12, 1956.

Justice cannot satisfy the appearance of justice, it is respectfully submitted, if a conviction in the federal courts is permitted to rest on the testimony of this witness without even a warning to the jury at the trial to weigh this informer's testimony with great care.

6. The public, as well as this Court, have a particular interest in the question presented here. No man is safe from the process of informing, especially when questions of a man's personal life, of his thoughts, opinions or political activities are under scrutiny. "Here is where employment of the informer may become dangerous to individual rights and liberties. The informer smacks of the police state; and we think that most Americans instinctively shrink from his use." *Editorial*, N. Y. Times, July 8, 1954. There is virtually no protection against the uncorroborated charges of these paid informers. The results of their accusations are devastating to the accused. Their threatened accusations are the easiest of blackmail methods. They virtually set the community in dissolution "where each man begins to eye his neighbor as a possible enemy. . . ." Hand, L., *The Spirit of Liberty* (1953), p. 284. The public, therefore, has a great interest

in preventing the dangers which flow from the unfettered activities of these paid professional informers.

Such public interest, and the due administration of justice, should be safeguarded by this Court. The balance between enforcement of the law and the protection of an accused from fabricated accusations should at the very least be struck by requiring in a case such as the one herein a caution to the jury to scrutinize the testimony of a paid informer with great care. This Court cannot disregard, it is respectfully submitted, the dictates of a history which bespeaks a volume of logic. The condemnation of the political informer is the condemnation of the civilized world throughout the ages. "The tale-bearer shall defile his own soul, and be hated by all." *Ecclesiasticus*, XXI, 31. For the medieval period, see Lea, *A History of the Inquisition of the Middle Ages* (1922), vol. I, pp. 371, 387; vol. III, p. 191. For English history, see May, *Constitutional History of England* (1880), vol. II, pp. 275-6. For the Alien and Sedition period in American history, see Miller, *Crisis in Freedom* (1951), p. 53. For the period of the 1920's, see Chafee, *Free Speech in the United States* (1941), pp. 215-218, 277-80, 489-90.

Moreover, there is involved herein by reason of all the aforesaid a serious question affecting the true administration of criminal justice in the federal courts. A decent regard for the "duty of courts as agencies of justice and custodians of liberty" (*McNabb v. United States*, 318 U. S. 332, 347) forbids the conviction of an accused upon the evidence of a professional paid informer without warning to the jury to weigh the testimony of the witness with great care. "Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone pre-

vent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." *McNabb v. United States, supra*, p. 343. Only recently this Court added: "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perversive claims of its disregard can be asserted." *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 124.

For all of the foregoing reasons, it is submitted that it was error for the trial judge to fail to guide the jury by precaution as requested by petitioner. As the above discussion also indicates, the error was harmful and prejudicial. Petitioner was not accorded the fair and impartial trial to which he was entitled. Without the testimony of the paid professional informers, the case could not even have gone to the jury. Had the warning and caution being given to the jury, with the impressiveness which accompanies a court's instruction, the result might have been quite different. At least this Court cannot speculate upon the question and resolve it against petitioner. The charge of the trial court fell far short of the requirements of the situation. It amounted to nothing more than the general admonition, which it is proper for the court to give in all cases. There is "grave doubt" here whether the failure to give the instruction did not substantially "influence" the result. The conviction should not stand. *Kotteakos v. United States*, 328 U. S. 750, 764-5.

Conclusion.

For all reasons herein given, the judgment of conviction should be reversed.

Respectfully submitted,

JOHN T. MCTERNAN,
NATHAN WITT,
Attorneys for Petitioner.

E. B. ELFERS,
Of Counsel.

APPENDIX I.

Comparison of Matusow Testimony at the Trial of Jencks and in His Recantation Thereof.

Trial Testimony

"Q. Did you have any conversations there on that occasion with Clinton Jencks, the defendant in this case, concerning the Communist Party or its activities?

"A. I did." [R. 243-244.]

Motion for New Trial Testimony

"Q. I will ask you if that was a true and correct answer?

"A. It was not.

"Q. I will ask you if the following questions and——

"THE COURT: You mean, then, it is false?

"THE WITNESS: Yes, your Honor.

"THE COURT: Let us just say it is true or false. Let us get down to the right point. He says that answer was false.

"MR. HARRIS: I don't want to interrupt. It wasn't quite clear to me, did Mr. Matusow indicate he had no conversation whatever?

"THE COURT: He said that was false, that is the way the Court understood it.

"Q. Now, will you state in what way that answer was false?

"A. The answer was to a question of whether I had

Trial Testimony

Motion for New Trial Testimony

discussions with Mr. Jencks about the Communist Party or its activities, and I had no such discussions with Mr. Jencks.

"Q. And in that respect the answer was false?

"A. Yes, sir." [H. 28-29.]

A. THE CONVERSATION WITH JENCKS AND MARCUS.

"Q. Do you know about when the first conversation occurred?

"A. Yes.

"Q. When was it?

"A. Shortly after I arrived.

"Q. Well, about what day in July, if you know, was it; what is the most accurate day in July that you went there?

"A. Well, it was in the latter part of July, between the 15th and 20th, to the best of my recollection.

"Q. Of 1950?

"A. That is correct." [R. 244.]

"Q. Will you explain in what degree it was true and in what degree it was false?

"A. The degree of truth was that I had conversations with Clinton Jencks and on or about those days I testified to, but it is false where I said that the discussion or conversations dealt with the Communist Party or its activities." [H. 30.]

"Q. Was anyone else present at this first conversation you have in mind that

"Q. Was that true or false?

"A. False.

Trial Testimony

you had with Jencks concerning Communist Party activities?

"A. Yes.

"Q. Who?

"A. Mr. Abraham Matcus.

"Q. I believe you have testified him as a Communist Party member, did you not?

"A. That is correct." [R. 244.]

"Q. From that conversation with Mr. Jencks or otherwise—I will withdraw that question. Please give us, the best you can, what was said by you, Mr. Marcus, or Mr. Jencks in this first conversation, and giving the setup for it, what you were doing, and so forth?

"A. I was unloading some cartons of Communist books from my truck, the truck which I travelled to the ranch in. Mr. Jencks and Mr. Marcus were helping me get the books out. Mr. Marcus said that he had written a book called 'Elements of Radio' which was used as a text book in the north city school systems, and I said that I had a copy of this book, be-

Motion for New Trial Testimony

"Q. In what respect is it false?

"A. I never knew Mr. Marcus to be a member of the Communist Party." [H. 31.]

"Q. I will ask you if that was a truthful answer?

"A. In part.

"Q. Will you tell us what parts are truthful and what parts were false?

"A. The fact that Mr. Marcus was there and he told me that he had written a book called 'Elements of Radio,' which was a book on physics and dealt with radio, to my recollection it was the only part of that which is true in relation to the conversation. There was no conversation about the Communist Party or Communist Party membership; and I did not have, as I stated, a Communist library; and when I said in that testimony that this book 'Ele-

Trial Testimony

ing one of the few non-Communist books I had in my library, to be sure; I started to unpack the cartons, a few of them, to try and find this book. While I was unpacking the cartons we started to discuss the Communist Party. I said that I had left New York permanently and was thinking of either living in New Mexico or California: that I was going to transfer my Communist Party membership to either New Mexico or California. When I said that Mr. Jencks said, 'It is a good idea, we can use more active Communists out here.' " [R. 244-245.]

Motion for New Trial Testimony

ments of Radio' was one of the few non-Communist books I had, that was completely false. The overwhelming majority of my books were not of a political nature but dealt with poetry, theatre, art, literature, et cetera.

"Q. What about the portion of that conversation you testified to relating to changing your Communist membership to New Mexico or California. Was that true or false?

"A. That was false. And, as I said, there was no discussion about Communist Party membership or Communist Party activities." [H. 31-32.]

B. THE CONVERSATION ABOUT "DO DAY."

"Q. Do you recall having another conversation with him along about that time or soon thereafter?

"A. I do.

"Q. About what was the date of this second conversation that you recall, if you know, approximately?

"A. Well, there were many conversations.

"Q. I mean, concerning

"Q. Were those answers true or false, and in what respect?

"A. They were true only in the respect to the fact that during that period of time I did see Clinton Jencks and talked to him but whether it was the second conversation with Clinton Jencks, I am quite sure that it was not the second conversation be-

Trial Testimony

the Communist Party activities?

"A. That took place, I believe the last Sunday in July or the first Sunday in August, 1950." [R. 245.]

"Q. And the second conversation about Communism with Mr. Jencks occurred, I believe you say, about the first Sunday in August?

"A. It was the first Sunday in August or the last Sunday in July.

"Q. Of 1950?

"A. That is correct." [R. 245.]

"Q. What, if anything —As best you can recall, relate the conversation with Mr. Jencks, what you said and he said, or anyone else who was present in the conversation?

Motion for New Trial Testimony

cause I saw him on many days and had many non-political discussions with him.

"Q. Did you ever hold any discussions with Mr. Jencks regarding Communist Party activities?

"A. No, sir." [H. 33.]

"Q. And will you tell us whether that was true or false?

"A. Partially true, partially false.

"Q. Will you tell us in what respects it was true and in what respects it was false?

"A. When I stated that I had discussions with Clinton Jencks about the Communist Party and its activities, that was false, and there again I believe it was not a second talk I had with him. I saw him on that day. But other than that it is true I was at the ranch at that time." [H. 34.]

Trial Testimony

"A. I told Mr. Jencks that I had just spoken to Mr. Joseph DeSanti, and had previously spoken to Mr. Craig Vincent about trying to expedite the transfer of my Communist Party membership from New York City to the State of New Mexico and he said it was a good idea, 'we can use you out here, we need more active Party members.'" [Partial answer, R. 245.]

"[A.] He then told me he was preparing a lecture which he was going to deliver at the ranch in regard to the Communist-sponsored Stockholm Peace Appeal and asked me what I and other Communists had been doing in New York in relation to the Communist-sponsored Stockholm Peace Appeal." [Partial answer, R. 245.]

Motion for New Trial Testimony

"A. That part is false." [H. 37.]

"A. Partially true, partially false.

"Q. In what respects is it false?

"A. The fact of the term 'Communist-sponsored Stockholm Peace Appeal.' The use of the term 'Communist' was my own doing in this court in an attempt to influence the jury and the court.

"MR. HARRIS: Now, your Honor, I don't think we are concerned with Mr. Matusow's opinions.

"THE COURT: Yes, that is right. Objection sustained.

MR. HARRIS: May we have it stricken, please?

Trial Testimony

"[A.] I told him we had been pretty active, getting signatures on petitions for this Stockholm Peace Appeal, that we had held street meetings and canvassed neighborhoods to get signa-

Motion for New Trial Testimony

"THE COURT: Yes, that part will be stricken from the record.

"Q. Now, as I understand your answer, the only portion of that which I read that was false was the reference to 'Communist-sponsored'?

"A. No. More than that. Mr. Jencks didn't ask me about what were Communists in the East doing about fighting for peace. He didn't refer to the Communist Party at all, as I recall. He didn't in his lecture deal exclusively with the Stockholm Peace Appeal.

"Q. We hadn't gotten to the lecture yet on this question.

"A. Well, in the discussion, there was a discussion in the lecture and that part was true but it had nothing to do with Communist Party activities." [H. 37-38.]

"A. If the 'we' I am referring to in my answer refers to Communists doing that then it is false. I believe I did tell Mr. Jencks that I with a group of other young people belonging to other or-

Trial Testimony

tures on petitions to raise funds. That one group of us had gone up to the Polo Grounds just before a Giant-Dodger double-header and painted sidewalks and walls, with slogans put up by the Stockholm Peace Appeal." [Partial answer, R. 245-246.]

"[A.] I told him about a 'do-day,' which we called ". That was a day when I told him we had no meetings. We just put into action everything we had discussed the preceding week. No discussion, no meeting, but our Communist Party club just went out and did it." [Partial answer, R. 246.]

"[A.] He said it was a very good idea. He would like to mention the 'do-day' in his lecture and bring that idea back to some of his fellow Party members in Silver City. I then asked him what

Motion for New Trial Testimony

ganizations, not the Communist Party, did circulate petitions of the Stockholm Peace Appeal, and had planned to paint slogans on the sidewalks near the Polo Grounds, but at no time did I refer to the Communist Party activities." [H. 38.]

"A. Partially true and partially false. The part referring to the Communist Party do-day was false. From my recollection of the discussion with Mr. Jencks I was referring to a do-day that I as a member of the American Newspaper Guild, CIO, had initiated with a group of rank and file newspapermen. I mean, in the Union Local 3.

"Q. Was there any reference to a Communist Party Club in that conversation?

"A. No, sir." [H. 39.]

"A. Partially true and partially false. Mr. Jencks did like the idea of a do-day and thought it would be a good idea for his own union activities in the Mine, Mill & Smelter Workers Union.

Trial Testimony

he and other Communists in New Mexico were doing in relation to the Stockholm Peace Appeal and the fight to put an end to the Korean War." [Partial answer, R. 246.]

"[A.] He pointed to a lapel pin which he was wearing, told me he had gotten that lapel pin when he was in Mexico visiting some Mexican Communist union organizers with the Mexican min-

Motion for New Trial Testimony

At no time did he say he wanted to use that in relation to the Communist Party activities. That would be false, when I referred to the Communist Party, and I didn't ask Mr. Jencks what he and other Communists were doing as the answers indicate that I did. I might have asked him what he was doing about——

"MR. HARRIS: Now, your Honor, I don't think the last part of that is responsive.

"THE COURT: No. We will confine it to the particular respect in which it is true or false.

"MR. BIGBEE: All right.

"Q. In other words, there was no reference to Communists or Communist activities in that entire conversation?

"A. That is right, sir." [H. 40.]

"A. Partially true. He did have a lapel pin of the Mexican Miners Union and said he had gotten it from members of the Mexican Miners Union. He didn't say that he had gotten it from

Trial Testimony

ers union.". [Partial answer, R. 246.]

"[A.] I don't remember the exact name of the union but it was something like 'Mexican Miners Union,' and said that some of the Mexican Communist organizers down there had been up in Silver City and visited with him, and that they were trying to see that their contracts, both in Mexico and the United States, ran out at the same time so that they would be able to end all mining and smelting, and so forth, in basic metal production in an attempt to cut off production or slow it down for the Korean War effort, which he termed as an unjust and imperialistic war." [Partial answer, R. 246.]

"[A.] And that, to the best of my recollection, is the second major conversation about Communism." [Partial answer, R. 246.]

Motion for New Trial Testimony

Communists or Communist organizers in Mexico." [H. 41.]

"A. Partially true, partially false. The reference to members of the Mexican Miners Union visiting him and discussing plans to cut off copper production was entirely false. The part that was true, I think Mr. Jencks did refer to and felt that the Korean War was an unjust war at that time.

"Q. But so far as you recall, that is the only thing in your answer that is true, the last portion?

"A. That is right, sir." [H. 41.]

"A. The whole answer was false, except the fact that I believe Mr. Jencks, my recollection is that Mr. Jencks did refer to the Korean War as an unjust war, but he didn't use the term 'imperialist' or 'unjust' that I recall." [H. 42.]

"A. That answer was false.

"Q. Why is that answer false?

"A. I did not have dis-

Trial Testimony

Motion for New Trial Testimony

cussions about Communism with Mr. Jencks." [H. 42.]

C. JENCKS' LECTURE AT THE RANCH.

"Q. As best you can recall, state what Clinton Jencks said concerning the matters you have just discussed and concerning Communism in any way?

"A. At this lecture, which I attended, Mr. Jencks spoke about the role of the trade unions in the drive for peace and for the Communist-sponsored Stockholm Peace Appeal." [Partial answer, R. 247.]

"[A.] He spoke in favor of the Soviet Union's plan for atomic and other disarmament and putting an end to the Korean War, being that the United States was the aggressor nation, we had no business being in Korea; and . . ." [Partial answer, R. 247.]

"A. He didn't refer to the Stockholm Peace Appeal as Communist-sponsored. I believe he did say that it was true when he referred to the trade unions as a fight for peace." [H. 44.]

"A. I have no recollection or had none when I testified of his mentioning the atomic disarmament plan of the Soviet Union. I believe he did say he was in favor of putting an end to the Korean War and I don't recall having heard him say the United States was the aggressor, but that was all I did recall at the time I testified to it.

"Q. You had no recollection of him making those statements at the time you previously testified?

Trial Testimony

"[A.] And during the lecture he referred to this 'do-day,' a day of no meetings but just action." [Partial answer, R. 247.]

"Q. Where at the San Cristobal valley ranch was it held?

"A. In the library at the ranch." [R. 247.]

"Q. What is the nature—do you know what the nature of the books in that library are, or what the nature was?

"A. At the time, yes." [R. 247.]

"Q. What nature books did you see there?

"A. Many books published by the Communist Party, International Publishers, New Century Publishers. There were magazines, 'Political Affairs,' which is officially the Communist Party theoretical magazine. Copies of the 'Daily Peoples World,' the West Coast Communist newspaper. And certain other

Motion for New Trial Testimony

"A. No recollection, no, sir." [H. 44.]

"A. He did jokingly refer to do-day in relation to my discussion with him." [H. 44.]

"Q. Was that true or false?

"A. It was true." [H. 45.]

"Q. * * * Was that testimony true or false?

"A. I gave that testimony, and I was familiar with the library. Yes, it was true." [H. 45.]

"Q. Was that testimony true or false?

"A. Partially true.

"Q. Will you tell us in what respect it was true and in what respect it was false?

"A. In respect that those books did exist in that library but I did not mention to the Court and give a complete description of that library, that the overwhelming majority of the books were of a fictional nature, and I

Trial Testimony

books not pertaining to Communism. I think they had an encyclopedia, some kind of fiction, mystery stories, and so on." [R. 247.]

"Q. Did Mr. Jencks make any comment about the books in the library that you recall?

* * *

"A. He did." [R. 249.]

"Q. Approximately what did he say about that?

"A. He asked the people present to read the 'Daily People's World,' the Communist Party newspaper on the West Coast; and I forget the names of the pamphlets but there were a few pamphlets that were published by New Century Publishers, the Communist Press, in relation to the Stockholm Peace Appeal and the drive for peace, as he called it." [R. 249-250.]

Motion for New Trial Testimony

just brushed that over lightly and said there was an encyclopedia and some westerns when that wasn't so. There were many books, an overwhelming majority of the books were of a standard nature." [H. 46.]

"A. That answer is false to my recollection, at the time.

"Q. Both then and now?

"A. I had no recollection then nor do I now of Mr. Jencks referring to any books that were of a standard nature." [H. 46.]

"Q. Was it true or false?

"A. It was false" [H. 47.]

D. THE CONVERSATION ABOUT A.N.M.A.

Trial Testimony

"Q. Did you have any other discussions concerning the Communist Party or any of its affiliates or activities after this lecture?

"A. I did." [R. 251.]

"Q. About when was this next conversation in that regard?

"A. It was about the time of the lecture." [R. 251.]

"Q. If you can, state what you said and Mr. Jencks or anyone else present at the conversation said?

"A. I told Mr. Jencks that I had joined the Taos, New Mexico, chapter of Anma, that I was working there until my Communist Party membership was transferred from New York to New Mexico." [Partial answer, R. 251.]

Motion for New Trial Testimony

"A. The answer was false." [H. 47.]

"A. You refer to the question about the discussion of the Communist Party or its activities?

"Q. Yes?

"A. That answer was false." [H. 47.]

"Q. Was it true or false?

"A. Partially false. I never told Mr. Jencks that I expected Communist Party transfer. In fact, I don't recall telling Mr. Jencks I joined the Taos Chapter of ANMA, but I had no recollection of telling him that when I testified nor do I now, though I could have told him that I joined ANMA, but I doubt it.

"Q. Did you have any conversation at that time or any other time with Mr. Jencks concerning the Communist Party or its activities?

"A. No, sir." [H. 48.]

Trial Testimony

"[A.] Mr. Jencks told me that this was proper Communist Party concentration work, that he was active in Anma in the Silver City area, and stated that Anma was a key organization as far as Communist activities were concerned in the state of New Mexico, that the Communist Party in the state controlled Anma and used it as a political sounding board, a propaganda sounding board in the state, and that Anma helped in cementing fraternal and working relationships with the Communist Party and the Mexican Miners Union in Mexico." [Partial answer, R. 251.]

Motion for New Trial Testimony

"Q. Was it true or false?

"A. It was false in every respect except that at sometime, not specifically that conversation, Mr. Jencks might have told me that he was active in ANMA and that there was an ANMA chapter or branch connected with his local of the union, but at no time did we discuss ANMA in relation to the Communist Party.

"Q. Do you now or did you at the time of giving the testimony have any specific recollection of any conversations with Mr. Jencks concerning any phase of ANMA?

"A. At the time I testtified and I do now recall Mr. Jencks in conversation sometime told me that he had been a member or there were members of ANMA in his union, but he never said that ANMA was a Communist front or a Communist-controlled organization." [H. 48-49.]

APPENDIX II.

Summary of Evidence Adduced at Hearing on Motion for New Trial, Arranged in Chronological Order.

1. February 7, 1952—Matusow testified before House Un-American Activities Committee concerning Jencks. (Hearings, Committee on Un-American Activities, House of Representatives, 82nd Cong., 2nd Sess.)

2. October 8, 1952—Matusow testified before McCarran Subcommittee of Senate Committee on the Judiciary. [H. 70; Hearings, Subcommittee to investigate the administration of Internal Security Act and other internal security laws, Committee on the Judiciary, U. S. Senate, 82nd Cong., 2nd Sess., pp. 153, 154, 175.]

3. October 8, 1952—Meeting of Mine-Mill representatives at Hotel Newhouse in Salt Lake City. On the day that Matusow testified at the McCarran hearing the Mine-Mill representatives gathered in the mezzanine of the Hotel Newhouse where their headquarters were. The witness Henderson heard Jencks talk to one Dolan. Dolan complained that Jencks had spoken to Matusow at all at the ranch in New Mexico. Jencks replied that he had to tell the man something, that he was a greenhorn out here in the West, and that Jencks more or less thought he was having a little fun by telling him some stories. [H. 540.] Dolan replied that this was foolish. [H. 541.] On cross-examination the witness Henderson testified in part as follows:

> "Q. But actually as far as you could ascertain what happened was this greenhorn came out here to New Mexico and got hurrahed and took it seriously and made a lot to do out of nothing, isn't that right? A. Yes, that is more or less right." [H. 542.]

The witness Weinert also testified to this conversation saying that Dolan asked Jencks what the idea was talking to "that phoney stoolpigeon Matusow" and Jencks replied that he had been with him at the San Cristobal Ranch, that Matusow had asked him about the strike, and Jencks "just handed him a line." [H. 534.] The witness thought that they were talking about the 1951 strike. [H. 537, 538.] The alleged conversation between Matusow and Jencks took place, of course, in 1950.

4. October 8, 1952—At the proceedings referred to in Item 2 above, Jencks was asked to deny Matusow's testimony and he claimed the privilege against self-incrimination. [H. 141-146.]

5. December, 1952—Matusow escorted one Arvella Bentley out of the country so as to place her beyond the reach of the subpoena of a Senate Committee investigating the financial transactions of Senator McCarthy. The trip was taken to cover up the transactions involving Senator McCarthy and it succeeded. Matusow later married Mrs. Bentley. [H. 197-200.]

6. January, 1953—Matusow sold to the newspaper columnist, Drew Pearson, the "story" of the trip, together with personal notes in his wife's handwriting and other corroborative materials pertaining to her. He did this without her knowledge [H. 200-201], and received $250 for it. [H. 197.]

7. April 20, 1953—Matusow testified before the grand jury in El Paso that returned the indictment against Jencks. [H. 68, 602; G-26 at H. 617-627.] He recanted it in detail at the hearing below. [H. 649-671.]

8. August 23 or 24, 1953—Matusow wrote his letter to Senator McCarthy, G-1 [H. 57-61.] Matusow claims

this letter indicates that he gave false testimony. [H. 61-65.]

9. August 27, 1953—Matusow spoke to an FBI agent at Santa Fe, New Mexico. According to Matusow he told the agent that he did not want to testify in the Jencks trial, that "I didn't feel my testimony was honest . . . I didn't want ever to testify and especially in the Jencks trial that was coming up." Matusow said that he dictated his statement to the agent and read over the agent's notes after they were written down. [H. 67-69.]

The agent's version of the incident is that Matusow asked to be spared the necessity of testfying at the Jencks trial because the resulting publicity would interfere with his disturbed marital relations with Arvella Bentley. The agent said that Matusow had made no reference to his not being honest in his testimony. [H. 754.]

The defense asked that the court direct the production of the FBI memorandum recording the conference between Matusow and the FBI agent. [H. 107, 147.] It was denied for the reason that "I take it that is part of the private files of the FBI." [H. 107.] The government had made no such assertion.

10. September 28, 1953—Matusow gave an affidavit to the New York Times retracting his testimony given at the McCarran Subcommittee (see Item 2 above) to the effect that there were some 120 Communist Party members among the employees of the New York Times. In the affidavit he admits that his McCarran testimony was "hearsay" and conjecture and surmise. [See G-4, paras. 6 through 12, H. 170-171.] At the hearing below Matusow admitted that many of the statements in the affidavit to the New York Times were untrue. [H. 173.]

11. Early October, 1953—Conversation with Elmer Davis. [H. 640.] Matusow told Davis that he had "wrongly accused people, both in speeches and under oath." [H. 643.]

12. Fall of 1953—Began work on book called "Blacklisting Was My Business." [H. 201.] This was a working title. [H. 201.] The outline of the book is marked G-6 [H. 213 ff.] and the sample chapter on McCarthyism is marked G-7. [H. 219 ff.] The outline was used by Matusow in writing the book which was published as "False Witness." [H. 208.] There is nothing in the outline about Jencks because at the time it was prepared the Jencks trial had not been held and Matusow felt that he would not be called as a witness because of his conversation with the FBI agent in Santa Fe. [H. 253.] The outline contained no material on Mine-Mill because at the time he prepared the outline Matusow was not sure in his decision to clear himself. [H. 254.]

Matusow went to a number of other publishers with his outline and draft chapter. [H. 244-251.]

The material under heading 8 in the outline, "Dude Ranch for Communists," does appear at various parts of the final book, "False Witness." [H. 234-248.]

13. December 4, 1953—Matusow testified before the Texas Industrial Commission. [H. 579; G-24 at H. 583-602.] He appeared there voluntarily. [H. 572.]

14. Jaunary 15, 1954—Matusow testified at Jencks trial in the United States District Court for the Western District of Texas, El Paso Division.

15. April 27, 1954—Matusow held his first conversation with Bishop Oxnam at the Waldorf-Astoria Hotel in New York. [H. 189, 278.] Matusow apologized to the

Bishop for having attacked him in a speech given by Matusow at Libertyville, Kentucky. [H. 278-280.]

Matusow substantially accepts in this hearing the version of this conversation given by Bishop Oxnam before the Subversive Activities Control Board October 18, 1954. [H. 628 ff.] So far as pertinent here, this version is that at the first meeting Matusow stated to Bishop Oxnam that he had lied again and again in statements made to committees and in reports he had made. Matusow said that he believed it his duty to go to each one about whom he had borne false testimony and ask for forgiveness. [H. 629.] Matusow also told the Bishop that he was writing a book called "Blacklisting Was My Business." [H. 629.] Bishop Oxnam stated his willingness to meet with Matusow again. [H. 630-631.]

16. May 29, 1954—Matusow held conversation with Messrs. Russell Brown and Robert Norvell, law associates of former Attorney General Howard McGrath. He told them that he had given false testimony in the past and the conversation was substantially the same as that with Bishop Oxnam on May 31 (see Item 17 below). [H. 638.]

17. May 31, 1954—Matusow's second conversation with Bishop Oxnam. [H. 631.] Here again Matusow now accepts substantially the version of this conversation given by Bishop Oxnam before the Subversive Activities Control Board. [H. 631-636.] So far as here pertinent, it is that Matusow stated to the Bishop that he had "borne false testimony" in his statements before different committees. [H. 632.] Matusow told the Bishop that he was writing a book on the world of McCarthy called "Blacklisting Was My Business" and he wanted an advance of $1,500 so that he could complete

the work on the book. The Bishop's understanding of the conversation is that Matusow wanted the Bishop to put up the $1,500. Matusow says that the Bishop got the wrong impression, that Matusow wanted the Bishop to help him locate a publisher from whom Matusow could get the advance. [H. 633.] In the second conversation Matusow borrowed $5 from Oxnam. [H. 281.] Matusow had with him at the second conversation copies of his outline and sample chapter of "Blacklisting Was My Business." [G-6 and G-7; H. 210, 192.]

18. "Before June, 1954"—Matusow's conversation with Mr. Fink of Department of Justice. [H. 260.] Fink asked Matusow to testify in a proceeding of the Subversive Activities Control Board against one Howard Selson. Matusow refused to testify. He did not tell Fink that he had lied in Jencks' or any other testimony. [H. 254-257.]

19. "Late May, 1954"—Matusow's conversation with Mr. Irons of the Department of Justice. [H. 264.] Matusow told Irons that his past testimony had been based upon his instability and he would prefer not to testify further. [H. 264.] Matusow however left the question of his further testifying up to the Department of Justice. [H. 264.] He did not tell Irons that he had lied before.

In connection with Matusow's reference to instability, it is highly significant that the Department of Justice knew as early as January, 1952, that Mr. Matusow had been diagnosed as having a "psychoneurosis of a mild but acute form." This diagnosis was first given to the United States Attorney in New York City in January, 1952. It was brought to the attention of Mr. Tompkins, Assistant Attorney General in charge of the Internal Security Division, on February 23, 1955. Mr.

Matusow's psychoneurosis was not called to the attention of the court at the trial of Jencks nor at the hearing on the motion although it is plain that the government was fully aware of these facts long before either of those proceedings. There are administrative proceedings in which the testimony of Matusow is being disregarded because of the revelations concerning his testimony and condition. (Hearings, Subcommittee of the committee on Appropriations, House of Representatives, 84th Cong., 1st Sess., pp. 293, 307; Subversive Activities Control Board, Report, *Herbert Brownell, Jr., as Attorney General of the United States v. Labor Youth League,* Docket No. 102-53, decided February 15, 1955, pp. 4 and 5. This material was not made part of the record in the trial court because the defendant did not know of it until after the hearing closed and the government did not choose to call it to the attention of the court.)

20. June, 1954—Matusow left New York and went to Dallas, Texas. His purpose was to get away from all of his past associates and to think out what he should do with reference to his past testimony. [H. 418.]

21. July 12, 1954—Matusow testified before the House Committee on Un-American Activities. This testimony was marked G-5 for identification. [H. 178.] Apparently Matusow was called before the committee in connection with Bishop Oxnam's public speeches in order that the committee could ascertain whether Matusow had lied at any time in testifying before it. In the course of that testimony Matusow made the following statements (Hearing, Committee on Un-American Activities, House of Representatives, 83rd Cong., 2nd Sess., July 12, 1954):

—After reviewing all of the occasions on which he had testified, including his testimony before the

grand jury and in the trial of the Jencks case, Matusow said, "Sir, I do not believe I told any untruth at any time under oath." [H. 183.]

—It is "correct" that he is "reaffirming the testimony that you gave this Committee when you appeared before it on February 6 and 7, 1952." [H. 185.]

—". . . and I did not say and I do not say now that I ever lied under oath. If I had lied under oath, I have no qualms about saying so." [H. 188.]

—After being confronted with a newspaper report of Bishop Oxnam's speech in which Oxnam attributed to Matusow the remark that Matusow wished to undo "all the lies I have told about many people," Matusow was asked whether the Bishop was correctly reported by the newspapers. Matusow's reply is, "If he was correctly reported by the newspapers, the Bishop is a dishonest man." [H. 188.]

Matusow testified at the hearing below that he would not have told the Un-American Activities Committee about Jencks or other false testimony because he did not trust Chairman Velde or the "Senator McCarthy crowd." [H. 426.]

22. September 13, 1954—Messrs. Witt and McTernan, counsel of record for Jencks, conferred in New York concerning a draft motion for new trial in the Jencks case based upon the Oxnam-Brown material (see Items 15, 16 and 17 above) and agreed to try to find a publisher to assist Matusow in writing his projected book. [H. 798.]

23. September 21, 1954—Mr. Witt reports to officers' meeting of Mine-Mill, at Butte, Montana, concerning Matusow's admissions of false testimony. Witt was directed

to continue his investigation and he was authorized to spend up to $1,000 in connection therewith. [H. 775-778, 443-445.]

24. "The first part of October," 1954—Beginning of relationship between Mr. Witt and the publishing firm of Cameron & Kahn. Witt met with Albert Kahn to discuss the project of publishing a book wri en by Matusow. This had already been discussed in part between Kahn and Jencks. Kahn told Witt that his publishing firm was in financial difficulties and would be unable to engage in the project without some money by way of an advance on an order of the book when published. Witt agreed to purchase on behalf of Mine-Mill $1,000 worth of books. These would be paper-bound books selling at 50 cents a copy so that the union purchased 2,000 such books. Witt advanced Kahn $250 before Kahn made his contract with Matusow. Thereafter Witt made payments to Kahn in October of $450, in November of $220, in December of $580, making a total of $1,250. [H. 774, 779, 780, 802.] Witt insisted with Kahn that Matusow not know about any financial arrangements made with Kahn on behalf of Mine-Mill. [H. 782.] Matusow testified that he first learned of the Mine-Mill advances to Cameron & Kahn on February 3 to 5, 1955 [H. 671], about two weeks after he had executed his recanting affidavit on January 20.

25. September or October, 1954—Matusow told an elder of the Mormon Church in Dallas that he had given false testimony. [H. 347, 357.] He claims his religious privilege against disclosing any conversation with representatives of the church on this subject. [H. 357-360.]

In this connection, while testifying in support of a motion for new trial based upon recantation of his testi-

mony in *United States v. Flynn* (130 Fed. Supp. 412), Matusow also claimed his privilege. He was there asked to write down the name of the religious adviser and seal the paper in an envelope pending ruling by the court on his claim. The claim of privilege was later rejected and the envelope opened. Matusow had written on the paper, "The Church of Jesus Christ Latter Day Saints in Dallas, Texas. I talked to a few leaders of the Dallas Stake." He did not enter the name of anyone on the piece of paper. [H. 362-374.]

26. October 1, 1954—Matusow became a convert to the Church of Jesus Christ of the Latter Day Saints. [H. 680.]

27. October, 1954—Matusow wrote the Attorney General denouncing the conviction of Corporal Batchelor and advising the Attorney General that he would not testify for the government any more. [H. 258, 266.]

28. October, 1954—Matusow received a message by telephone from his parents in New York that Mr. Cameron of the firm of Cameron & Kahn was trying to reach Matusow. This occurred before Matusow left Dallas on his hitch-hiking and bicycle trip. [H. 297-299.] Matusow tried unsuccessfully to reach Cameron before leaving Dallas. [H. 300.]

29. "Late October," 1954—Matusow left Dallas to go to Salt Lake City, planning to engage in uranium prospecting in Utah. [H. 283, 284, 302.] At that time his mind was made up to tell the truth but he had not told anyone. [H. 284.] He left Dallas on foot with a knapsack on his back. [H. 285.] He hiked and hitch-hiked and later bought a secondhand bicycle in some small town, paying for it from funds in his pocket. [H. 287.] At various places he earned a meal or a little money washing

dishes or picking cotton or harvesting maize. [H. 291, 294, 317.] He estimates the amount of money in his pockets at one time as between $70 and $100 and later as between $40 and $60. [H. 300.] He cannot recall whether he took the manuscript of "Blacklisting Is My Business" with him when he left Dallas. [H. 301.]

30. October or November, 1954—Incident at Amarillo, Texas. While on the trip from Dallas Matusow stopped at Amarillo. There he was accosted by a policeman who frisked him and demanded identification. Fearing that he was on the verge of arrest he told the officer some falsehoods. As he recalls it he told the policeman that he was a former undercover operator for the FBI. He does not recall that he told the policeman that at that time he was an agent for the FBI. [H. 310-314.]

31. October 21, 1954—Matusow arrived in Taos, New Mexico, en route from Dallas, Texas. [H. 319.]

32. October 22, 1954—Matusow reached Kahn of Cameron & Kahn by telephone from Taos. [H. 321, 324, 325.] Kahn told Matusow that he was interested in seeing Matusow's manuscript. Matusow said he was on his way to Salt Lake City and Kahn offered to meet him there. Matusow said that his manuscript was in New York and Kahn asked Matusow to come to New York. Matusow replied that he would if Kahn were seriously interested in publishing the book. Matusow finally agreed to go to New York from Taos if Kahn would send him a round-trip ticket. [H. 326.]

33. October 22, 1954—Matusow traded his bicycle for hotel accommodations. Matusow made this trade after the telephone call with Kahn. He wanted to get rid of the bicycle because he knew he was going to New York. [H. 321, 322.]

The owner of the hotel testified that Matusow said on the night of his arrival (and before the call to Kahn) that he might have to trade his bicycle for a room. The trade was made the next day and the owner agreed to take the bicycle for 4 or 5 days' rent, having settled on the value of the bicycle at $15. Matusow left before he had used up the full amount of his trade. [H. 706-709.] The owner thought that $15 was the fair value of the bicycle. [H. 710.] Making trades of this kind is not unusual for this hotel. [H. 723.]

34. October 22, 1954—Matusow borrowed $10 from Doughbelly Price. [H. 322.] Matusow thinks he negotiated this loan after he had the telephone conversation with Kahn. [H. 327.] The loan was made by check and Matusow cashed it at El Patio Restaurant in Taos. [H. 327, G-25 at H. 610.]

35. October 22, 1954—Matusow held conversation with one Golden in Taos. This conversation occurred on the Friday after Matusow arrived. [H. 332.] The conversation dealt with the Oxnam testimony, and in the course of it Matusow said, "I never lied under oath." [H. 613.]

36. October 22, or 23, 1954—Matusow had conversation with two Mormon missionaries in Taos. [H. 611.] According to one of these missionaries, Matusow accosted them in Taos near the post office telling them that he had recently been converted as a member of their church and had made a trip from Dallas by bicycle. [H. 760.] The witness continued,

> "I guess he mentioned the fact that he had been working against the Communist Party that was in a dude ranch near that area. . . He tried to establish his identity by asking if we had read a

book that he had written, if I recall right, and either that or it was he referred to a book he was going to write about the Party, or about the experiences that he had with the Party at the dude ranch." [H. 760-761.]

37. Matusow's contacts with Riley Taintor in Taos. Taintor saw Matusow on the first full day that Matusow was in Taos. He also saw him the next day. On these occasions Matusow said that he was "broke" and either Taintor or Doughbelly Price paid for such things as coffee or lunch when they were together. Taintor was present when Matusow asked Price for a loan and he saw Price give Matusow a check. [H. 730-733.] The last time Taintor saw Matusow the latter was excited saying that he was going to New York and was getting an advance and a plane ticket from his publisher. [H. 734.] This conversation occurred on the same day that Matusow left Taos by bus. [H. 735.] Matusow took Taintor to dinner that time and was very happy over the fact that his deal for publishing his book had gone through. Matusow exhibited a large roll of bills saying that he had gotten an advance of $1,000. [H. 737.] Taintor describes the roll of bills as "very large," saying that he could see "at least two ten's, maybe a twenty, maybe two twenty's." [H. 737.] Matusow admitted that he saw quite a bit of Riley Taintor on the Saturday that he was in Taos (October 23) and he said that he could have been at the bus station with him that day. [H. 334.] Matusow denied Taintor's testimony dealing with the advance from the publisher and the roll of bills. [H. 345.] Matusow testified that he received no money in Taos from Cameron & Kahn or from Mine-Mill. [H. 342.]

38. October 23, 1954—Matusow left Taos for New York. He traveled from Taos to Albuquerque by bus.

on the evening of October 23. [H. 344.] He arrived in Albuquerque sometime after 8 o'clock, perhaps closer to 10 or 11 o'clock. [H. 375.] He traveled from Albuquerque to New York by TWA, his flight leaving sometime after midnight and in the early morning hours of October 24, 1954. [H. 375.] In Albuquerque Matusow picked up his plane ticket as a result of a purchase order sent by Kahn in New York. [H. 330.]

39. October 23, 1954—Matusow conversation with Atchison at TWA ticket counter in Albuquerque. Atchison and Matusow talked about Matusow's trip from Dallas to Taos. [H. 546.] Matusow told him that he was a free-lance writer and was gathering material for a book. In response to Atchison's question why Matusow was discontinuing his trip Matusow replied that he was wanted back in New York to write a book. Atchison asked whether he was going to write the book about his experiences on the trip and Matusow answered, "No, they are not interested in the truth but as long as they will pay money for it I will write anything." [H. 546-547.] Atchison understood Matusow's remark to mean that "whoever he was going to write a book for didn't want to buy his book on his experiences walking across the country." [H. 553.] Matusow denied making the quoted statement to Atchison. [H. 378, 671.]

40. October 25, 1954—Matusow held his first meeting with Cameron and Kahn at the Hotel Delmonico in New York City. [H. 233.] He discussed with them the writing and publishing of the book which he had partially written under the title, "Blacklisting Was My Business." Matusow brought to this conference the material which he had already prepared for this book, namely, the outline G-6, the sample chapter G-7, together with ap-

proximately 100 pages of draft. [H. 234, 378.] There was no mention of Jencks in the material that he brought to this meeting with him. [H. 253.]

Cameron & Kahn did not tell Matusow that they had been in touch with Witt about this project, and they did not tell him that Mine-Mill had authorized the expenditure of $1,000 to assist in the writing of the book. [H. 379.] Matusow at that time knew of no arrangement between Cameron & Kahn and Mine-Mill to purchase his book when it should be written. [H. 379.] At that time Matusow had "some inkling" that he would write "some affidavits." [H. 379.] The arrangements that Matusow asked for were an advance of $1,500 to cover the following: $50 a week for a period of about 4 months, $250 in cash, the plane fare from Albuquerque to New York, and such secretarial help as Matusow should need. [H. 379-380.] Matusow in turn was to deliver 5500 words per week beginning on November 1, 1954, and to have a completed manuscript by February 1, 1955. [H. 402.] Cameron & Kahn suggested that he needed more time, perhaps until June or July, but Matusow insisted upon this schedule. [H. 403.] Matusow was not told that February 1 was the last date for filing a motion for new trial in any of the cases in which he had testified. [H. 403.]

Tentative agreement was reached on these terms at the first meeting but Cameron & Kahn said they wanted to sleep on it. [H. 379.]

There was no talk of Jencks or of affidavits at the first meeting. Matusow did not trust Cameron & Kahn and therefore did not tell them his full intentions. [H. 380.]

41. October 25, 1954—Matusow had conservation with Mr. Daly of the Department of Justice. [H. 427.]

This conversation was over the telephone and dealt with the Bishop Oxnam incidents as well as the possibility that Matusow had given false testimony. [H. 427.] Matusow told Daly that if Oxnam had reported Matusow as saying that he had lied, Oxnam was wrong. [H. 428.] Matusow made an appointment to see Daly but failed to keep it. [H. 428.] Matusow admits that he was very evasive with Daly. [H. 428.] He told Daly that he never again intended to testify. [H. 430.] At that time he had in mind eventually preparing affidavits in the Jencks and Flynn cases. [H. 432.] He was evasive because he did not trust the Department of Justice, believing it to be corrupt. [H. 432.]

42. October 26, 1954—Matusow signed his first contract with Cameron & Kahn. [G-15; H. 383-385.] Kahn called Matusow on October 26, the day following the meeting at the Hotel Delmonico. [H. 400.] At Kahn's invitation Matusow went to Kahn's home at Croton, New York, and there signed the contract. [H. 395-400.] At the time the contract was signed Kahn advanced Matusow $250 in cash. This was to permit Matusow to get an apartment so that he could work in privacy. [H. 381, 401.] Matusow moved into this apartment on or about November 1, 1954. [H. 402.]

When this contract was signed the projected size of the book was 60,000 words, amounting to approximately 350 pages. It was planned to sell for between $4 and $4.50. [H. 648.] Later the plans were changed because the book amounted to only 256 pages. This sells in the conventional trade edition for $3. [H. 648.] The changes in the contractual arrangement necessitated by this are embodied in the supplemental agreement marked G-16. [H. 385-395.]

Under Matusow's royalty arrangements he would receive $700 from the sale of 10,000 copies of the book. [H. 410.] The final royalty arrangement is set forth in paragraphs VII, VIII, IX and X of the agreement of February 1, 1955. [G-16; H. 388-390.]

43. October 29, 1954—Matusow held conversation with Messrs. Connors and Koffsky of the Department of Justice. [H. 428.] This conversation occurred three days after signing the contract with Cameron & Kahn. [H. 428.] They asked Matusow concerning the Oxnam and Brown incidents, and Matusow was "kind of evasive to them." [H. 428.] Matusow feared that they had approached him in order to get evidence against him. [H. 429.] Matusow told Connors that he never again intended to testify. [H. 430.] Matusow does not recall whether he told these men that he had not lied under oath; if he did tell them that it was false. [H. 430.]

44. November, 1954—Matusow's work on the book, "False Witness," began at or about this time. [H. 85.] The first step was to dictate material to a tape in the presence of Kahn. These were often in the form of conversations with Kahn. [H. 90.] This process began early in November, 1954, and ran into mid-December, 1954. [H. 91, 414.] In making these recordings Matusow kept information from Kahn because he did not trust him [H. 92], and as a consequence some of the references to Jencks were deliberately false. [H. 93.] Matusow told Kahn he would withhold information from him until he received assurances that it would not be made public until Matusow agreed to it. [H. 93-94.] These recordings were transcribed in two copies, and Matusow edited the original only, the other copy going to Kahn. [H. 96-97.] Kahn was present at Matusow's

suggestion. [H. 404.] Kahn was present on all occasions except one. [H. 404.] It was Kahn's un-edited copy that was produced before the New York grand jury and again in this case. [H. 97.] Kahn's role in this work was to ask questions for clarification. [H. 340, 341.]

Witt kept current on these developments through Kahn and received copies of the tape recordings from Kahn. [H. 781.] He gave Kahn a copy of Matusow's testimony at Jencks' trial so that the same could be furnished to Matusow. [H. 781-782.]

45. December 14, 1954—Matusow met Witt at the latter's office. [H. 105, 784.] This meeting was pursuant to appointment requested by Matusow, arranged by Kahn. [H. 105.]

Matusow on this day agreed that his chapter on Mine-Mill could be shown to Mine-Mill's executive board in return for the assurance that no use would be made of it until the book was ready or until Matusow otherwise gave permission. [H. 105.] Matusow discussed with Witt his conversations with Oxnam and Brown told Witt that he thought both of these men had violated his confidence. [H. 672.] In response to Matusow's request, Witt agreed to keep confidential whatever Matusow told him. [H. 673, 783-786.]

Witt and Matusow also talked about a possible prosecution against Matusow for perjury. This conversation extended over several meetings, both before the affidavit in this case was signed and afterwards. [H. 350, 353-354, 795-796.] Matusow was not persuaded to sign the affidavit because of these conversations. [H. 355.] Witt told Matusow that he would not discuss the Jencks case with Matusow because he would not leave any grounds

for the claim that he had influenced Matusow in any way. [H. 673, 788, 790.]

It was on this same date, viz., December 14, 1954, that Matusow completed dictating to the tape with Kahn. The transcriptions marked G-27, 28 and 29 [at H. 692-697] were dictated on this date. [H. 689-692.] Included in these recordings is the following passage:

> "I knew Jencks was a Party member and I said so. I can't say here that Jencks wasn't a Party member after he signed the affidavits because I know that he was. But I shouldn't have testified. That's the important thing. K: Why do you say you know he was? M: I say I know he was—I mean in this way. Men like Ben Gold who have been indicted on the same charge. He officially resigned from the Communist Party. Or he could have. Let's put it that way. But in—to my mind—then, in my thinking, it made him no less a Communist because he put a piece of paper down and said I'm no longer a member. As far as I was concerned, Jencks was still under Communist Party discipline. And there's a difference. He legally, according to the law, might not have been a member of the Party. I didn't know the difference. Jencks didn't change his thinking because he issued that scrap of paper." [H. 696-697].

46. "About the first of the year," 1955—Matusow completed the chapter in the book "False Witness" dealing with Jencks. [H. 103.]

47. The first week of January, 1955—Matusow prepared the work outline marked G-17. (Apparently marked for identification only. [H. 415.]) He did this alone and gave a copy to Kahn. He did it in order to organize the material. [H. 415-416.]

48. January 15, 1955—Matusow completed a draft of the manuscript for "False Witness." [H. 568.] The portion of the draft marked G-23A was written between December 1, 1954, and January 15, 1955. It pertains to Jencks. [H. 681.] G-23A reads as follows:

> "Jencks was not alone. Others have been indicted for the same charge. Accused of being members of the Communist Party after they had signed the non-Communist affidavit of the Taft-Hartley Law. Jencks could have been a Communist Party member, yes. I had no way of knowing it. And I didn't care. Jencks had been a Communist Party member and I presumed he had submitted his resignation as others had done prior to his signing the non-Communist affidavit. But, to my mind at the time, a piece of paper didn't make him any less a Communist." [H. 684.]

49. January 16 or 17, 1955—Matusow prepared draft of affidavit in Jencks case. He dictated it at home and Kahn brought him a transcription. [H. 84.] By this time the book had been completed. [H. 85.]

Witt worked on the affidavit in this fashion: He drafted a form of the affidavit, including a summary of the testimony that had been given in the Jencks trial, leaving blank spaces in the form for Matusow to fill out in his own language his recantation. [H. 788.] Witt told Matusow that he did not want to suggest the language of the recantation and did not want to discuss it. [H. 788.] The recantation language in the affidavit is Matusow's. [H. 788-789, 809-811.]

50. January 20, 1955—Matusow executed the recantation affidavit in this case. [H. 789.]

51. Week of January 24, 1955—Executive Board and officers of Mine-Mill made further arrangements with Kahn concerning publication of Matusow's book. The union agreed to pay Kahn an additional $2,000 by way of a further advance order of copies of the book. This made a total advance order of 6500 copies for which the union paid $3,250. [H. 803.] At this time the union also approved plans for publicizing and selling the book. [H. 453 ff.] In this connection it is to be noted that Mr. John Clark, president of Mine-Mill, placed this meeting on "January 4th." [H. 450.] The date there stated may be a reporter's error. In any event the date seems clearly erroneous since at that time Matusow had not prepared his last work outline or his first draft manuscript. (See items 47 and 48 above.)

APPENDIX III.

Opinion of Judge Bazelon in Gold v. United States (C. A., D. C.), No. 12352, Opinion Filed April 19, 1956.

CLERK'S OFFICE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12352

BEN GOLD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Statement of Circuit Judge Bazelon's reasons for voting in favor of reversal of the judgment of the District Court on appeal in the above-entitled case.

Filed April 19, 1956

Mr. Harold I. Cammer, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, and *Mr. Joseph Forer,* with whom *Mr. David Rein* was on the brief, for appellant.

Mr. Joseph Lowther, Assistant United States Attorney, with whom *Messrs. Harold D. Koffsky* and *E. Brandon Alvey,* Attorneys, Department of Justice, were on the brief, for appellee. *Messrs. Leo A. Rover,* United States Attorney, and *Lewis Carroll,* Assistant United States Attorney, also entered appearances for appellee.

BAZELON, *Circuit Judge:* I was a member of the division of this court which originally heard this appeal from a conviction on two counts of filing a false non-Communist affidavit. Thereafter a rehearing in banc was ordered by the court, sua sponte. The rehearing culminated in an order, on March 9, 1956, affirming the conviction by an equally divided vote and reserving for each judge the right to file a "statement of his vote and his reasons." I choose to state my views because important issues vitally affecting the administration of justice are involved.

As a condition for making the processes of the National Labor Relations Board available to a labor organization, § 9(h) of the Taft-Hartley Act requires that each officer of the labor organization file annually with the Board a non-Communist affidavit stating that

> "he is not a *member* of the Communist Party or *affiliated* with such party, and that he does not believe in, and is not a member of or *supports* any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[1]

A specific provision of § 9(h) makes false affidavits punishable under 18 U.S.C. § 1001 (commonly known as the false statements statute), which declares it unlawful "in any matter within the jurisdiction of any department or agency of the United States" to "knowingly and willfully" make or use "any false writing . . . knowing the same to contain any false . . . statement . . . ."[2]

---

[1] 61 STAT. 146 (1947), 29 U.S.C. § 159(h) (1952), emphasis supplied.

[2] 62 STAT. 749 (1948), 18 U.S.C. § 1001 (1952). That part of § 1001 dealing with false statements was added by the Act of June 18, 1934, 48 STAT. 996. In the general revision of the Criminal Code in 1948, § 1001 emerged from § 35 of the Criminal Code (18 U.S.C. § 80), as amended by the Act of 1934. In that revision, 18 U.S.C. § 80 was split up. The portion relating to false claims against the Government now appears in 18 U.S.C. § 287, the so-called false statements part in 1001. 62 STAT. 698, 749. The legislative history of §1001 is traced in United States v. Gilliland, 312 U.S. 86, 93-95 (1941). See also United States v. Bramblett, 348 U.S. 503, 507 (1955).

By the passage of § 1001, Congress intended to reach statements which, because they were not under oath required by an act of Congress, were not subject to prosecution under the existing perjury statute, now 18 U.S.C. § 1621. S.REP.NO. 288, 73d Cong., 2d Sess. (1934); H.R.REP. No. 829, 73d Cong., 2d Sess. 1-2 (1934); see also 78 CONG. REC. 2858, 2859, 3724 (1934).

While serving as president of the International Fur and Leather Workers Union, on August 30, 1950, appellant Gold filed the required affidavit. A prosecution under § 1001 followed, charging in three separate counts that Gold lied when he swore that he was not a member of the Communist Party, or affiliated with it, or a supporter of "any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods." After a trial by jury, he was acquitted on the "affiliation" count and convicted on the "membership" and "support" counts.

I.

One of the grounds for reversal urged by Gold relates to the trial court's refusal to apply the rule of evidence in perjury cases,[3] which bars a conviction on the uncorroborated testimony of one witness.[4] The refusal was based on the premise that only "perjury," brought under 18 U.S.C. § 1621 (1952),[5] and not charges of false state-

---

[3] Fisher v. United States, — F.2d — (9th Cir. Feb. 15, 1956), the only case directly in point, held the rule inapplicable. The issue arose, but was not decided, in Todorow v. United States, 173 F.2d 439, 443 (9th Cir. 1949). Cf. Bridges v. United States, 199 F.2d 811 (9th Cir. 1952); Miranda v. United States, 196 F.2d 408, 410 (9th Cir. 1952).

[4] Weiler v. United States, 323 U.S. 606 (1945); Hammer v. United States, 271 U.S. 620 (1926); Young v. United States, 94 U.S.App.D.C. 54, 59, 212 F.2d 236, 241, *cert. denied*, 347 U.S. 1015 (1954).

[5] That section provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully

ments otherwise proscribed by law, are within the centuries old rule.

The "continued vitality" of the perjury rule has been recognized by the Supreme Court in the last decade,[6] despite criticism that the rule has outlived its usefulness.[7] "An oath against an oath" will not support a conviction. The Government must "establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances."[8] The evidence must be "strong, clear, convincing and direct."[9] It must establish "the fact to be proved without the necessity for . . . inference."[10] This is in contrast with circumstantial evidence "which establishes the fact to be proved only through inference based on human exper-

---

and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury . . . ." 62 STAT. 773 (1948).

The perjury statute, now § 1621, first appeared in § 5392 of the Revised Statutes, which "was a substitute for a number of statutes in regard to perjury and was phrased so as to embrace all cases of false swearing whether in a court of justice or before administrative officers acting within their powers . . . ." United States v. Smull, 236 U.S. 405, 408 (1915).

[6] Weiler v. United States, 323 U.S. at 609.

[7] 7 WIGMORE, EVIDENCE §§ 2040, 2041 (3d ed. 1940).

[8] Weiler v. United States, 323 U.S. at 607.

[9] United States v. Neff, 212 F.2d 297, 307 (3d Cir. 1954).

[10] Radomsky v. United States, 180 F.2d 781, 783 (9th Cir. 1950); see also United States v. Nessanbaum, 205 F.2d 93, 97 (3d Cir. 1953); State v. Riggs, 61 Mont. 25, 53-55, 201 P. 272, 281 (1921). There must be evidence of a direct nature presented by one witness before circumstantial evidence may serve as corroboration. See United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

ience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present."[11]

I think appellant was entitled to the protection of the perjury rule.[12] A prosecution for "false statement" under § 1001 is virtually identical with one for "perjury" under § 1621. Falsity is the essential element in each.[13] Cf. *Hammer* v. *United States*, 271 U.S. 620, 629 (1925). Ordinarily there is one significant difference between the two in that the "false statement" to be prosecuted under § 1001 need not be made under oath. But this difference is absent in the present case. The defendant's non-Communist affidavit was made, and had to be made, under oath. That is the nature of an affidavit. The Government must prove the oath as an element of the offense. But that Congress specifically required false 9(h) affidavits to be prosecuted under § 1001, this case could as easily have been prosecuted under the perjury statute as under the false statement statute.[14] There have been

---

[11] Radomsky v. United States, *supra* note 10.

[12] Weiler v. United States, 323 U.S. at 611.

[13] That the offense of swearing falsely in an affidavit is basically the same as swearing falsely before a judicial tribunal is recognized by courts-martial procedure. The Manual for Courts-Martial, 1951, by its terms "assimilates the requirements of proof of perjury to the offense of false swearing." United States v. Gomes, 3 U.S.C.M.A. 232, 239 (1953). *False swearing*, according to the Manual, embraces "giving false testimony in a judicial proceeding . . . or in making a false oath to an affidavit." Par. 213d(4). *Perjury* consists of "giving in a judicial proceeding . . . any false testimony . . . ." Par. 210.

[14] Indeed, false swearing in a 9(h) affidavit has been referred to as "perjury" by Justices Frankfurter and Jackson. American Communications Ass'n v. Douds, 339 U.S. 382, 420, 436 (1950). Justice Jackson said: "The only sanc-

many prosecutions and convictions under the perjury statute for false writings required by law to be under oath and voluntarily submitted to Government departments and agencies.[15] Some of these false writings have been affidavits.[16] There is no reason why a person charged with perjury under the name of false statement should be entitled to fewer safeguards than a person charged with perjury under the name of perjury.[17]

---

tion prescribed, and probably the only one possible in dealing with a false affidavit, is punishment for perjury." *Id.* at 436.

[15] These cases antedate § 1001, the false statement statute. *E.g.*, United States v. Smull, 236 U.S. 405, 408 (1915); Johnson v. United States, 26 App.D.C. 128 (1905); United States v. Abelow, 14 F.Supp. 304 (S.D.N.Y. 1936); United States v. Crandol, 233 Fed. 331 (E.D.Va. 1916); Ralph v. United States, 9 Fed. 693 (N.D.Ill. 1881); United States v. Hampton, 101 Fed. 714 (4th Cir. 1900). See also United States v. Morehead, 243 U.S. 607, 609-10 (1917); Boehm v. United States, 123 F.2d 791 (8th Cir. 1941).

[16] *E.g.*, United States v. Smull, 236 U.S. 405 (1915). When, as here, the affidavit is sworn to before a notary, a state officer, 1621's requirement that the oath be taken before a "competent tribunal, officer or person" is satisfied. United States v. Morehead, 243 U.S. 607, 617 (1917).

[17] Legislative history of § 9(h) does not show why Congress specified prosecution under § 1001 rather than § 1621. The bills as introduced in the House and Senate did not include a penalty provision. *E.g.*, H.R. 3020, 80th Cong., 1st Sess. § 9(f)(6) (1947) (as passed by the House); § 9(h) (as passed by the Senate). It was not until the Conference Committee reported out the bill that any mention was made of § 35A of the Criminal Code, the precursor of § 1001. H.R. Rep. No. 510, 80th Cong., 1st Sess. 12 (1947). But there was no discussion of this point in either the Conference Committee Report, *id.* at 49, or in congressional debate on the bill, 93 CONG.REC. 6447 (1947).

When § 9(h) was enacted in 1947, heavier penalties could

I turn first to describe the evidence and then to discuss whether it is sufficient, under the perjury rule, to sustain the verdict on either the "membership" or "support" count of the indictment.

II.

Appellant was an open and avowed member of the Communist Party for thirty years prior to August 24, 1950. He had attended a revolutionary training school, the Lenin Institute of Moscow, in 1930-31, and was a member of the governing body of the Communist Party from 1936 to 1948. But on August 24, 1950, he submitted the following written resignation:

> Gus Hall, National Secretary
> Communist Party, U.S.A.
> 35 East 12th Street
> New York, N. Y.
>
> Dear Gus:
>
> I am herewith submitting my resignation from, and severing my affiliation with, the Communist Party.
>
> Please acknowledge by return mail.
>
> Fraternally yours,
> Ben Gold

---

be imposed under § 1001 than under § 1621. At that time the maximum penalties for conviction under § 1001 were imprisonment for ten years and a fine of $10,000. 48 STAT. 996 (1934). In 1948 the term of imprisonment was reduced to five years, the $10,000 fine being retained. 62 STAT. 749. See Reviser's Note, 18 U.S.C. §287 (1952). Both before and after 9(h) became law, the maximum penalties for conviction under § 1621 have been imprisonment for five years and a fine of $2,000.

Five days later, on August 29, 1950, appellant executed the non-Communist affidavit in issue here. He filed it on August 30, 1950. At the same time he issued a lengthy public statement explaining his resignation, which he afterwards published in the September 1950 issue of his union magazine, "Fur and Leather Worker." The statement included the following:

> "I have resigned from the Communist Party. I was a member of the Communist Party for almost 30 years.
>
> "The Congress of the United States denies me my constitutional right to belong to the Communist Party and at the same time to hold office in a trade union.
>
> ". . . Although the Communist Party is a legal party, the Taft-Hartley slave labor act states that a union officer cannot be a member of that Party.
>
> • • • •
>
> "Our union is now compelled to comply with this law in order to defend our organization and the conditions of our members against the raiding, wrecking and strike breaking activities of the treacherous top officials of CIO and AFL.
>
> • • • •
>
> "As a member of the Communist Party for 30 years, I found the thinking of the members of the Communist Party, its program and activities determined by one, and only one, burning desire—to serve the best interests of labor and the people to end the cruel exploitation of the working people, racial hatred and bigotry, and to build up an economically secure, politically free, united, democratic and peaceful America.
>
> "Neither I nor the Communist Party ever believed in or advocated the overthrow of any democratically-elected government by force and violence.
>
> "Workers, trade union members, progressives, liberals and Communists have a true appreciation and love for democracy. They believe in the Four Freedoms: Freedom from Want, Freedom from Fear, Freedom of Speech and Freedom of Worship. These.

freedoms can exist only in democratic countries. In police states under ruthless dictatorships, trade unions are outlawed, true liberals, progressives and Communists are jailed and their parties banned. Therefore, honest and true labor leaders, liberals and progressives and Communists are the staunchest fighters for democracy and democratic liberties.

• • • •

"I have resigned from the Communist Party, but I do not give up my belief in true democracy.

"I have complied with the Taft-Hartley Law as directed by my union, but I shall continue to fight for repeal of this slave labor law and for the re-enactment of the Wagner Act."

Appellant served as a member of the United May Day Committee from 1935 to 1940, and in May 1951 and 1952 he marched with his union and spoke at May Day parades.[19]

The rest of the Government's case consisted of opinion testimony by seven ex-members of the Communist Party who were presented as expert witnesses on Party teachings.[20] Five had separated from the Party at various times from 1929 through 1948. Only two, Harper and Lautner, were members as late as 1950. None of the seven had seen or talked to appellant after 1949; two, Harper and Budenz, had never seen him, and two others, not later than 1929 and 1931. The testimony of all may be summarized as follows:

---

[19] The Government does not contend that the content of the speeches has any relevance to either count.

The Government also presented evidence that Gold and his union were active in the defense of Irving Potash, one of the eleven Communist leaders convicted of violating the Smith Act, see Dennis v. United States, 341 U.S. 494 (1951), but does not rely upon it in this appeal.

[20] Three were paid employees of the Department of Justice, compensated on a per diem basis. Another had "joined" the Communist Party at the behest of the F.B.I.

Public Announcement. Three of the ex-Party members [21] testified that Gold's public announcement of his resignation, particularly the statement

> "Neither I nor the Communist Party ever believed in or advocated the overthrow of any democratically-elected government by force and violence"

and

> "I have resigned from the Communist Party, but I do not give up my belief in true democracy"

was couched in "Aesopian language," which the Party used to convey to its members a hidden meaning that would not be apparent to the uninitiated. They stated that, in the lexicon of Communism, the phrases "true democracy" and "democratically-elected government" refer to the dictatorship of the proletariat or the Soviet Union. Not only did these witnesses express their opinions on the Party meaning of these and other terms, but they were permitted to testify, in addition, that Gold's use of these terms in the announcement of his resignation was a reaffirmation of his membership in the Party.[22]

---

[21] These were Gitlow, Johnson and Lautner who had left the Party in 1929, 1940, and January 1950, respectively.

[22] On this point, witness Gitlow's testimony is typical:

"Q. Mr. Gitlow, calling your attention again to the paragraph that reads 'I have resigned from the Communist Party, but I do not give up my belief in true democracy,' do you have an opinion as to whether or not that paragraph contains the use of language which you described to the jury yesterday as having double meaning? A. It does.

"Q. And can you tell these ladies and gentlemen what the double meaning is and what in the language therein contained constitutes the double meaning? A. Yes; the words 'true democracy'.

"Q. Go ahead, sir. A. 'True democracy', in the Communists' lexicon, exists only under the dictatorship

On the other hand, the defense showed that Gold had many times used these terms in their ordinary sense and had often referred to the United States as a democracy.

The "Can't Resign" Theory. All seven of the prosecution's witnesses testified that it was the uniform policy of the Party not to permit members, particularly "effective" members or leaders, voluntarily to leave the Party. Termination of membership, they said, could be accomplished only through expulsion. Two of these witnesses, however, stated that they themselves had quit. If, despite the general policy, a member attempted to resign, the witnesses testified that he would be denounced and abused by the Party press, notably the Daily Worker. It was their opinion that failure of the Worker to "abuse" appellant in reporting his resignation proved that appellant had not terminated his membership.[23]

Appellant's Participation in May Day Activities. Three Government witnesses who had left the Party in

---

of the proletariat.

"Q. Does that paragraph contain any language with respect to membership in the party, in the double meaning that you described? A. It does.

"Q. What is that? A. It is a reaffirmation of membership in the Communist Party."

[23] Lautner, for example, testified: "An entirely different type of article would have appeared in the Daily Worker, in which Ben Gold would have been exposed as an enemy of the Communist Party, and the party memberhip as a whole would have been warned that 'From now on, keep away from Ben Gold, increase your vigilance, and close ranks in the Party and carry out the party policies towards this person.'"

Appellant's continued membership was also proved, the Government says, by the appearance, subsequent to the resignation, of articles in the Daily Worker which referred to appellant in "favorable" rather than unfavorable terms. The testimony was that the Worker would not have carried favorable references if appellant had resigned.

1929 (Gitlow), 1940 (Johnson), and 1950 (Lautner), testified that, in their opinion, the annual May Day activities were organized by and were under the "domination and control" of the Communist Party. It was the Party, they said, which determined who the speakers should be. In the opinion of one witness, the Party would not allow a person who had "broken" with the Party to speak at a May Day Parade. The witnesses admitted on cross-examination, however, that non-Communists and non-Communist organizations were encouraged to participate.[24]

III.

Here, as in every perjury case, the gist of the offense is the alleged "contradiction between the accused's oath and his belief . . . ."[25] To establish this contradiction requires proof of (1) the "falsity of the testimony and [2] the lack of a belief in its truth. Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself."[26] As I have pointed out, circumstantial evidence is not enough; there must be direct evidence[27] which, if believed, conclusively establishes falsity.

---

[24] Gitlow, for example, said: ". . . the Communist Party did permit sympathizers of the Communist Party . . . to speak at Mayday affairs of the Communist Party." Lautner stated that the Party tried to get all kinds of mass organizations to march.

[25] Remington v. United States, 191 F.2d 246, 249 (2d Cir. 1951).

[26] Young v. United States, 94 U.S.App.D.C. 54, 59, 212 F.2d 236, 241, *cert. denied*, 347 U.S. 1015 (1954).

[27] Remington v. United States, 191 F.2d at 249.

A. *The Membership Count*

The statute appears to contemplate three different degrees of relationship with the Communist Party, or an organization advocating overthrow of the Government by force and violence—membership, affiliation, and "support." Membership is more than affiliation, which is a "working alliance to bring the program [of the organization] to fruition."[28] Membership connotes a formal tie with or status in the Party, proof of which depends on the crucial "act of joining." *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950).

Illustrative of the nature of the direct evidence required to establish this crucial act is the showing the Government made in *Bridges* v. *United States*, 199 F.2d 811, 834 (9th Cir. 1952), *reversed on other grounds*, 346 U.S. 209 (1953). There a conviction for falsely denying, in a naturalization proceeding, membership in the Communist Party was sustained on proof that the accused filled out an application for membership which was turned in to Party headquarters, agreed to assume a new name, paid dues to a unit secretary, had a Communist Party book, admitted membership in the Party at a public meeting, attended a national convention of the Party, and was elected to the national committee. The Court rejected the notion that membership could be proved by "mere association" with the Party, approval of some or all of its aims or activities, sympathy with its programs, contributions of money, or active cooperation with its activities.[29] Though such conduct may reflect "affiliation"

---

[28] Bridges v. Wixon, 326 U.S. 135, 144 (1945).

[29] See also United States v. Reimer, 79 F.2d 315 (2d Cir. 1935), where attendance at a meeting, signing and turning in an application form, and payment of an initiation fee, *inter alia*, were held to establish at most "sympathy" for the Party, and to fall short of proving "affiliation" and, a fortiori, membership.

or "support," it is not sufficient to show membership. See *Bridges* v. *Wixon*, 326 U.S. 135, 143 (1945).

The issue here is not whether appellant ever joined the Party, but whether he retained an actual, perhaps secret, membership after he resigned. The evidence required to establish continued membership after resignation should be comparable in quality to that required for "an act of joining."[30] Section 9(h) appears to recognize that a man may sever his membership without giving up his belief in some or all of the objectives of the Party; he may be an adherent by conviction without being one by membership. This appears from the statute's reference to affiliation and support as grounds for denying Board facilities.

When a man has been an avowed member of the Communist Party as long as Ben Gold, a purported resignation for the express purpose of enabling his union to avail itself of N.L.R.B. facilities is bound to be viewed with suspicion. But we must recognize the possibility of a genuine choice to leave the Party in order to stay with the union. The very object of § 9(h) is to stimulate such a choice.[31] As the Supreme Court said in *American Communications Ass'n* v. *Douds*, members of the groups described in § 9(h) "are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past."[32]

---

[30] *E.g.*, that one continued to pay dues to the Party, or permitted the Party to retain his name on its current books; or took an active part in formulating the Party's programs and directing its activities; or admitted a secret membership; or was told by the Party leaders to engage in Party activities secretly.

[31] In addition, of course, the penalty attached to 9(h) is designed to compel those who could not or would not resign their Communist allegiance to resign or be forced from their union positions.

[32] 339 U.S. at 414.

There is danger that long-continued past membership in the Communist Party, plus an asserted presumption of continuity, may obliterate the presumption of innocence that should prevail in a criminal case and place the burden of proof on the defendant. Great care must be taken to assure that present membership is proved by evidence of the required amount and quality. Such evidence is lacking in this case. There is no direct proof that appellant was a member on August 30, 1950, when he filed his affidavit, or at any later time. His public announcement of his resignation, and his participation in the May Day parades of 1951 and 1952, are at most only circumstantial evidence that he was still a member.

Read as ordinary English, the public announcement of the resignation does not contradict the fact of resignation but confirms it. If the form of the announcement can be regarded as indirect evidence of continuing membership, this is only because of the opinion testimony of ex-Communists who translated so-called Aesopian language, particularly appellant's affirmation of continued belief in "true democracy," and said that words like "democracy," "true democracy," and "democratically-elected government," as used in the announcement, referred to the Soviet Union.

The admissibility of this testimony is challenged on the ground that the opinion rule bars the use of expert testimony to define ordinary terminology.[33] Appellant says that rule has particular force here because (1) appellant was not shown to have used the terms in their special sense, and (2) the translation was not based on a written lexicon. But I think the court rightly admitted this evidence. The witnesses had qualified as experts on Party teachings. They said the terms used had a special meaning for Communists. In view of appellant's admitted thirty-year membership in the Party, it was not

[33] 7 WIGMORE, EVIDENCE § 1955 (3d ed. 1940).

unreasonable to permit the jury to infer that he was using these terms in their special sense. In *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), *affirmed*, 341 U.S. 494 (1951), the Court held that opinion evidence was competent to translate terms such as "Marxism-Leninism," "revisionism," "opportunistic error" and "exceptionalism," because they had "an accepted conventional meaning among members of the Party."[34]

But the opinion testimony of the experts does not provide the required direct proof of concealed membership. Assuming the accuracy of the experts' translation, appellant's statement "I have not given up my *belief* in *true democracy*" might mean no more than that he had not given up his belief in the Soviet Union or the dictatorship of the proletariat. This belief, if proved, is not direct proof of Party membership.

Nor was direct proof supplied by the further testimony of some of the experts that, in their opinion, appellant meant he was still a member. This testimony was inadmissible. The witnesses could testify that his words were capable of this sense, but not that he used them in this sense. That testimony, which touched the ultimate issue in the case, was outside the scope of their expertise.[35]

Gold's appearance as a speaker at the 1951 and 1952 May Day parades is only indirect evidence, if any, of Party membership on August 30, 1950.[36] Lautner, who

---

[34] 183 F.2d at 229.

[35] See Simmons v. United States, 92 U.S.App.D.C. 122, 124, 206 F.2d 427, 430 (1953); cf. Riley v. United States, — U.S.App.D.C. —, —, 225 F.2d 558, 559 (1955).

[36] Appellant's union had participated in the May Day parades since 1907, and the occasion was a traditional holiday for union members. Union members, both Communist and non-Communist, have always marched in the parades, and did so in 1951 and 1952. The evidence tended to show, on the other hand, that the Party controlled and dominated the organization of the celebration.

left the Party in January 1950, testified that in his opinion the key speeches in 1951 and 1952 would have been made by Party members, and that no one who had broken with the Party would have been allowed on the platform. As evidence that appellant was a member when he swore he was not, this involves the following inferences: (1) a man who left the Party in 1950 knew what qualifications were required of speakers at the 1951 and 1952 May Day parades; (2) since this man said the speakers were required to be Communists, and since Gold was a speaker, Gold was a Communist on those dates; (3) therefore Gold was a Communist on August 30, 1950.[37]

Aside from these "overt acts" of appellant, as interpreted by the "expert witnesses," the Government's case consisted of conclusory opinion testimony as to the general rules, teachings and tactics of the Communist Party, chiefly to the effect that the Party did not accept resignations and abused members who tendered them. Such general testimony is not direct evidence of what appellant did or did not do. If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with § 9(h), and the statutory phrase "is not a member" is precisely equivalent to "has never been a member." This possibility *Douds* specifically rejects.

It follows that appellant is entitled to acquittal on the membership count.

---

[37] The court's holding in United States v. Neff, 212 F.2d 297, 308 (3d Cir. 1954), with respect to the character of the corroborative evidence required is a fortiori applicable here: "Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable —not merely probable—conclusion of falsity. The corroborative evidence . . . must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof."

B. *The Support Count*

The other count on which the appellant was convicted charged him with "support" of an "organization, namely, the Communist Party, which said Party taught the overthrow of the United States Government by force." He contends, and I agree, that the "support" clause of the affidavit required by § 9(h) means "support" of the "organization" in its objective of forcible overthrow. *American Communications Ass'n* v. *Douds* makes clear that § 9(h) was aimed at barring from union leadership adherents of the doctrine of forcible overthrow[38] because they "represent a continuing danger" of translating that belief into action by fomenting "disruptive political strikes."[39] The statute reaches these persons in two ways.

First, it specifically refers to members and affiliates of the Communist Party. Though the Party purports to be a political organization, the Supreme Court found no infringement of First Amendment rights because the Communist Party differs from other political parties in the nature of its program—chiefly its dedication to the principle of violent overthrow—and in the nature of its membership. Membership is akin to a conspiracy wherein "individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility

---

[38] "In enacting 9(h), Congress had as its objective the protection of interstate commerce from direct interference, not any intent to disturb or proscribe beliefs as such. Its manifest purpose was to bring within the terms of the statute only those persons whose beliefs strongly indicate a will to engage in political strikes and other forms of direct action when, as officers, they direct union activities." 339 U.S. at 407.

[39] 339 U.S. at 393.

for and participation in *all* that makes up the Party's program,'' [40] including the principle of violent overthrow.

Second, the statute aims at those whose adherence to the doctrine of forcible overthrow is shown not by an "act of joining'' but from the inference that they "believe'' in it or from evidence that they support an organization that "believes in or teaches'' it. Here Congress moved closer to the realm of First Amendment rights, since questions of "belief'' and "support'' turn so largely upon proof of an individual's opinions and views.

The Court's opinion in *Douds* resolved the conflict between the national interest, as embodied in the statute, and the individual interest by narrowly reading the portion of the oath dealing with belief.[41] The opinion makes clear that the terms of the oath cannot be construed so as to force, contrary to our basic traditions, "disclosure of attitude on all manner of social, economic, moral and political issues.'' [42] The only belief whose disclosure the

---

[40] 339 U.S. at 432, emphasis supplied. And see Dennis v. United States, 341 U.S. 494, 498 (1951), where the Court cites with approval a Court of Appeals finding that the Party is rigidly controlled and that "Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party . . . .''

[41] Only three members of the Supreme Court joined in this opinion. Since the Court was equally divided as a result of the non-participation of three members, this opinion sustained the validity of the belief portion of the oath by affirming the Court of Appeals. Justices Jackson and Black dissented, primarily on First Amendment grounds. 339 U.S. at 442-45, 445-53. Justice Frankfurter dissented on the ground that, in certain respects, the second part of the oath, including the term "supports," was void for vagueness. *Id.* at 415.

[42] 339 U.S. at 410.

Court held could be forced, as a condition of union leadership, was a belief in violent overthrow. And the Court recognized that a serious constitutional question would be posed if the statute were read to "include all persons who might, under any conceivable circumstances," subscribe even to this belief.[43] Accordingly the Court construed the entire clause, in consonance with the dominant purpose of 9(h), to apply to persons and organizations believing in violent overthrow of the Government "as it presently exists under the Constitution as an objective, not merely a prophecy."[44]

The Court in *Douds* did not construe the word "support," except to hold that the word itself, in the context of 9(h), was not too vague for criminal purposes. I cannot, consistently with the First Amendment, read "support" more broadly than the Court said "belief" might be read. To "support" an organization ordinarily may have two meanings: (1) to aid or participate in its activities, as by contributing money; (2) to express belief in its objectives.[45] The words "support of an organization," in this case the Communist Party, broadly interpreted, apply to an expression of belief in any of the objectives of the Party, no matter how lawful.

This was the thrust of the court's instruction. The court gave the jury the following dictionary definition of "support":

> "To uphold by aid or countenance; to take the side or promote the cause of; to back up, as, for example, to support the administration; also, to uphold or defend as valid, right, just, etcetera; as, for example, to support a policy, even at the risk of life

---

[43] *Id.* at 407.

[44] *Ibid.*

[45] Usually "support" in the first sense is a form of "support" in the second sense.

> or fortune, or as another example, to support the claim of." [Webster's New International Dictionary.]

Under that guide "support" might be found if, for example, a person upheld or defended as "valid . . . a policy," such as repeal of the Taft-Hartley or Smith Act, which policy merely happened to coincide with the policy of the Communist Party on those issues. Support might also be found on the basis of evidence that appellant "regarded May Day as an international labor holiday, opposed the McCarran, Velde, and McCarthy committees, had favored a second front during World War II, had denounced the 80th Congress, and had made a public appeal for funds for the legal defense of Smith Act defendants." [46]

The vice, for criminal purposes, of the broad dictionary definition was compounded by a second portion of the instruction, which followed the literal wording of the statute. The jury was told a conviction depended on the finding that appellant's

> "actions constituted support, as the word support had just been defined, of an organization which taught the overthrow of the United States Government by force, and that said support was being given by defendant on August 30, 1950."

If this interpretation of the statute prevails, once it is found that a "coincidental parallelism" [47] exists between some of an individual's views and some of the objectives of the Communist Party, the jury may convict him of false swearing if it thinks the Party advocates forcible overthrow of our Government, even though the individual does not "support" that advocacy. We should

---

[46] Brief for appellant, p. 47.

[47] Justice Frankfurter, concurring in part and dissenting in part in American Communications Ass'n v. Douds, 339 U.S. at 422.

decline to read the statute in a manner which would make its constitutionality doubtful. We should hold that the "support of an organization" which the statute contemplates is support of "violent overthrow of the Government as it presently exists under the Constitution as an objective" of the organization, not support of other and entirely lawful objectives of the same organization.[48] It is this reading which must prevail in a prosecution for false swearing based on the statutory oath. This is no more than the traditional requirement of proof of aiding and abetting, a concept closely akin to support, that the aider and abettor must not only know of but share in the unlawful purpose of his principal,[49] or of conspiracy, where all who conspire must share the unlawful purpose of the joint action.[50]

I find no direct evidence which would justify an inference that, on August 30, 1950, appellant supported the Party in the objective of violent overthrow of our Government as it presently exists. At most a legitimate inference can be drawn from appellant's participation in Party activities during the 1920's and 1930's[51] that he gave such "support" long before he signed the affidavit. There is no evidence, of the quality required to sustain a perjury conviction, to show that appellant adhered to

---

[48] 339 U.S. at 407.

[49] Pereira v. United States, 347 U.S. 1 (1954); Nye and Nissen v. United States, 336 U.S. 613, 619, 620 (1949); Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

[50] United States v. Falcone, 311 U.S. 205 (1940); United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938).

[51] It was shown, for example, that, in 1930-31, appellant, at the Lenin School in Moscow, took courses in insurrection, sabotage, overthrow of capitalist governments, use of poison gas, and studied maps of New York, Pittsburgh, Detroit and Gary to determine how to cripple a city.

that view when, or after, he resigned from the Party on August 24, 1950. His appearance as a speaker at May Day parades in 1951 and 1952 is not direct proof of adherence to that view. The Government concedes that the contents of his speeches are irrelevant.

His public announcement is capable of the construction that he was in accord with the lawful objectives of the Party.[52] It cannot be taken as direct evidence of a belief in or support of the objectives the statute proscribes.

I would, therefore, reverse the conviction on both the support and membership counts, and remand the case with directions to enter a judgment of acquittal.

IV.

Even if appellant were not entitled to a judgment of acquittal, there are at least two errors which would require reversal for a new trial.

A. An F.B.I. agent, investigating another case in which falsity of a non-Communist affidavit was also charged, telephoned or visited three members of the petit jury or their families during the trial and inquired whether they had received any "propaganda" literature. The impact of these contacts on the jurors involved, and those who heard about them was so prejudicial that its effect could not be erased, and was perhaps even enhanced by the hearing the court held to determine if any should be disqualified. *Remmer* v. *United States*, 350 U.S. 377 (1956), makes plain that the

---

[52] *E.g.*, "As a member of the Communist Party for 30 years, I found the thinking of the members of the Communist Party, its program and activities determined by one, and only one, burning desire—to serve the best interests of labor and the people to end the cruel exploitation of the working people, racial hatred and bigotry, and to build up an economically secure, politically free, united, democratic and peaceful America."

court's refusal to declare a mistrial here is prejudicial error.

B. As I pointed out, *supra*, the opinion testimony that appellant's resignation statement was in fact his reaffirmation of party membership, was inadmissible to support the conviction. Even if there was other evidence upon which the conviction could be sustained, this opinion testimony was so highly prejudicial that its erroneous admission requires a new trial. The question whether or not appellant was still a member, or had resigned, was for the jury, not for the opinion of the witnesses. To permit witnesses to testify, as Budenz did, for example, that a certain sentence in appellant's resignation statement "is an assertion of continued membership in the Communist Party"[53] is in substance to transform the trial by jury into a trial by experts.

V.

Finally the case should also be remanded for a hearing on appellant's offer, which the trial court rejected, to prove that Government employees on the grand and petit juries were biased as a class.[54] My views on the grand jury issue are expressed in *Quinn* v. *United States*.[55] They are applicable with even greater force to the petit jury. A determination that Government employees are disqualified as grand jurors in this case would require dismissal of the indictment; disqualification as petit jurors would require a new trial.

---

[53] See also note 22, *supra*.

[54] Thirteen members on the indicting grand jury were Government employees. Five Government employees and the wife of a Government employee were on the petit jury.

[55] 91 U.S.App.D.C. 344, 350, 203 F.2d 20, 26 (1952) (dissenting opinion).